NO. 57,562

STATE OF LOUISIANA	IN THE FIRST JUDICIAL DISTRICT
VS	
LEVERT H. TAYLOR, DELORIS MC GINNIE, MARIE MC GINNIE, HAROLD L. BETHUNE, DAVID JAMES DENNIS AND HARRY BLAKE	COURT, CRIMINAL SECTION, PARISH OF CADDO, STATE OF LOUISIANA

(carbon copy)

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
EARL DOYLE	1	6		
CHARLES A. GIGLIO	7	12	23	
JERRY COLES THOMAS	28	42	44 57	52 61
ORVAL RICHARDS	62	65		
D. M. MEECHAM	72	82	94	97
M. F. HEAD	97	103	104	
JAMES A. DENT	105	110		
MELVIN G. GUTHRIE	114	121	129	
BILLY R. FLOWERS	129	134		
JOHN H. GREEN	135	139		
H. H. PITTMAN	140	145		
HOMER C. BRYANT	151	166		
HARVEY D. TEASLEY	174	183	199	199
HARRY BLAKE	206	211	225	
HAROLD BETHUNE	226	231	247	

E X H I B I T S

EXHIBIT	OFFERED	RECEIVED
State 1 through 8	65	65
State 11 and 12	65	65

NO. 57,562

STATE OF LOUISIANA	: IN THE FIRST JUDICIAL DISTRICT
VS	: COURT, CRIMINAL SECTION, PARISH
LEVERT H. TAYLOR, DELORIS MC GINNIE, MARIE MC GINNIE, HAROLD L. BETHUNE, DAVID JAMES DENNIS AND HARRY BLAKE	: OF CADDO, STATE OF LOUISIANA

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EVIDENCE adduced and proceedings had on the trial of the above entitled cause at Shreveport, Louisiana, beginning on August 18, 1961, before His Honor, JOHN A. DIXON, JR., Judge of the First Judicial District Court, Criminal Section, in and for the Parish of Caddo, State of Louisiana.

APPEARANCES: MR. JOHN A. RICHARDSON, District Attorney, counsel for the State;
MR. JESSE N. STONE, JR., counsel for the defendants;
MRS. LAURINE K. BROWN, Official Court Reporter.

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P R O C E E D I N G S

EARL DOYLE

called as a witness on behalf of the State, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RICHARDSON:

Q Please state your name and occupation.

A Captain Earl Doyle, Shreveport Police Department.

Q Captain Doyle, how long have you been with the Shreveport Police Department?

A Seventeen years.

MR. RICHARDSON: May it please the Court, this is a trial on a misdemeanor. The State is not requesting the testimony be taken down. I understand the defense is doing that. Is that correct?

MR. STONE: That is correct, Your Honor.

THE COURT: The testimony is being taken at the expense of the defendants?

MR. STONE: That is correct.

THE COURT: And not at the expense of the State?

MR. STONE: Not the State; that is correct, sir. We, of course, wish to be able to reserve any bills of exception that we may desire at the expense of the State.

THE COURT: Proceed.

BY MR. RICHARDSON:

Q Captain Doyle, on the night of August 3rd and the early morning of August 4th of this year, were you on duty at the Shreveport Police Department?

A I was.

Q And what was your shift that night?

A Eleven at night till seven in the morning.

Q Does the Shreveport Police Department have a phone listing for night major?

A Sir?

Q Does the Shreveport Police Department have a telephone listing under Night Major?

MR. STONE: If Your Honor please, we object to that as being irrelevant and immaterial.

THE COURT: I can't see that it is relevant. Sustained.

BY MR. RICHARDSON:

Q Captain Doyle, on that morning of August 4th, with

reference to this case, what was the first occasion you had of anything relative to this case?

A It was approximately four o'clock in the morning. Assistant Chief Giglio was out of the building. Under his instructions --

MR. STONE: (Interrupting) If Your Honor please, we object to any testimony concerning what the instructions of the chief were to any of his subordinates unless those instructions were given in the presence and hearing of these defendants.

THE COURT: The objection is overruled.

MR. STONE: If Your Honor please, we wish to take exception to the ruling of the Court and ask that the record show that the basis for out objection was that the instructions to the subordinates of the chief or assistant chief, unless given in the presence of these defendants -- presence and hearing of these defendants -- were irrelevant and immaterial.

THE COURT: Well, that wasn't the objection. As far as I know such instructions would be irrelevant and immaterial. Do you care to argue the point?

MR. RICHARDSON: No, Your Honor.

THE COURT: Do you object on the grounds of irrelevancy?

MR. STONE: Yes, sir.

THE COURT: The objection is sustained.

BY MR. RICHARDSON:

Q Where was assistant chief Giglio at that time?

A He was out in the patrol car.

Q Now, then, what was the first thing, while he was out of the building or out of the office, what was the first thing that occurred that you had any knowledge of directly, relating

1 to this case?

2 A His phone--his office is approximately fifty feet

3 from my office. His phone on the straight line began to ring.

4 Knowing that he was out of the building I went down and answered

5 the telephone. When I answered it a voice on the other end of

6 the line wanted --

7 MR. STONE: (Interrupting) If Your Honor please, now,

8 we object to what he heard by way of telephone, unless, of course,

9 his testimony is going to be that one of these defendants told

10 him something on the telephone.

11 MR.RICHARDSON: Now, if the Court please, at this

12 stage, I do care to argue this objection.

13 MR. STONE: The basis for this objection is that it is

14 hearsay, and that it hasn't yet been shown that it has any rele-

15 vancy. A telephone call has not been yet shown to have any

16 relevancy.

17 THE COURT: I understand the objection. I will hear

18 from the State.

19 MR. RICHARDSON: If the Court please, the statute

20 provides that whoever with intent to commit a breach of peace

21 or under the circumstances by which a breach of the peace might

22 be occasioned thereby, congregates together at certain places

23 and then fails to disperse and move -- I am simply showing the

24 nature of the original contact by which the Shreveport Police

25 Department, insofar as this officer and assistant chief Giglio,

26 had any idea that there was going to be a breach of peace. That

27 is all I am showing, the fact that he received the call, not for

28 the truth of anything stated in the call, but the fact that he

29 received a telephone call that alerted him and apprized him of

30 what was about to take place.

1 MR. STONE: If Your Honor please, of course, our
2 position is that he can tell that he got a phone call that concerned
3 this incident, but, to be able to say what was said and that
4 sort of thing, of course, that is what we are objecting to.
5 THE COURT: Did you get a phone call concerning this
6 incident?
7 THE WITNESS: Yes, sir.
8 MR. STONE: All right.
9 THE COURT: Proceed.
10 BY MR. RICHARDSON:
11 Q After you got that phone call, what did you next do?
12 A Well, they asked to speak to assistant chief Giglio.
13 MR. STONE: Now, if Your Honor please, we object to
14 that.
15 THE COURT: That is sustained. Don't tell us what
16 you were told. You were asked what you did.
17 BY MR. RICHARDSON:
18 Q How many phone calls did you receive that morning
19 relating to this particular incident that later on took place?
20 A Only the two.
21 Q And after you received those two phone calls, I will
22 ask you first, did either of the callers identify themselves?
23 A They refused to identify themselves;the first one did
24 and the second one did, too.
25 Q Now, after you received those two phone calls from
26 unidentified callers, relating to this incident, what did you
27 next do?
28 A I called the assistant chief.
29 Q And who is that?
30 A Chief Giglio.

1 Q Did Chief Giglio used to be the night major?

2 A He is the night major, assistant chief.

3 Q And what did you do when you contacted him?

4 A Well --

5 MR. STONE: (Interrupting) If Your Honor please,

6 we object to that as being irrelevant and immaterial. I can't

7 see that what might have taken place in a police station between

8 the captain and the major or any other officers would have any

9 bearing on whether or not these defendants intended to breach the

10 peace. Now, of course, I think the Court and all of us would

11 assume that they did whatever they thought was necessary, if

12 they thought a breach of the peace was imminent, but, I can't

13 see that their doing something is relevant to the question of

14 whether or not these defendants actually intended or actually

15 provoked a breach of peace. On the basis of that we make our

16 objection to the question.

17 MR. RICHARDSON: If the Court please, all I am en-

18 deavoring to show is that he passed on the nature of these two

19 phone calls to assistant chief Giglio, and that he, Captain

20 Doyle, had nothing further to do with the case. Then, I can

21 excuse him as a witness.

22 THE COURT: The objection is sustained.

23 BY MR. RICHARDSON:

24 Q After you passed on the nature of these two phone

25 calls to Chief Giglio, did you have any other connection with

26 this case?

27 A No, sir.

28 MR. RICHARDSON: The witness is tendered.

29 CROSS EXAMINATION

30 BY MR. STONE:

Q So, then, you don't really know anything about it, do you, Captain Doyle, except what you heard on the telephone or what you later learned after it was all over, and what you and the major did at that time. Is that correct?

A All I know is I got a call that it would happen.

(Witness excused.)

CHARLES A. GIGLIO

called as a witness on behalf of the State, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RICHARDSON:

Q Please state your name and occupation.

A I am Charles A. Giglio, Major of the night shift from eleven p. m. to seven a. m.

Q Major Giglio, on the evening of August 3rd and the early morning of August 4th of this year, were you on duty at the Shreveport Police Department?

A Yes, I was.

Q What was the first instance that you knew that there would be any difficulty in connection with this case; what was your first knowledge of it?

MR. STONE: Now, if Your Honor please, we object to that. The major has not testified that he knew of any instance. The prosecutor is assuming a fact that is not proven. And it is on that basis that we make this objection.

THE COURT: I don't think that is a very material objection. The objection was technically good, but it is of the type that would tend to slow down these proceedings considerably, and it can't in any way, I think, prejudice the rights of the defendants. The objection has been made, and I will have

1 to sustain it.

2 Do you know anything about this case?

3 THE WITNESS: Not until I got the telephone call.

4 THE COURT: Did you know anything about it after that?

5 THE WITNESS: Yes, sir.

6 THE COURT: All right. Answer the question Mr.

7 Richardson asked you.

8 BY MR. RICHARDSON:

9 Q Mr. Giglio, after you got the telephone call, will

10 youtell us whom you got the call from?

11 A I got the call from Captain Doyle. He was at the desk.

12 Q Then, after you got that call were you out of the station

13 at the time?

14 A Yes, I was. I was out riding.

15 Q In a car?

16 A Yes, sir.

17 Q And what did you next do?

18 A I immediately telephoned Chief Teasley in his home.

19 Q Then, what did you do after that?

20 A After that I returned back to headquarters -- no.

21 Before that I radioed headquarters to have Car 24 --

22 MR. STONE: (Interrupting) Now, if Your Honor please,

23 we object to that-- we withdraw the objection at this time.

24 THE WITNESS: I radioed headquarters to have car 24

25 and patrol wagon 27 to meet me at headquarters.

26 BY MR. RICHARDSON:

27 Q And where was patrol car 24 at that time?

28 A It was riding District 4. That is the Queensboro

29 Section.

30 Q Queensboro is a residential area?

1 A Yes, sir.

2 Q Who was in Car 24?

3 A Officer Meecham and Guthrie.

4 Q Who was riding at that time in the other car?

5 A Patrol wagon 27 was officer Head.

6 Q And what sort of a unit is that?

7 A Well, it is a patrol wagon. It is a rolling patrol

8 wagon. It doesn't answer calls, but when I am in direct call,

9 it answers back-up calls to patrol cars and it makes pick-ups.

10 Q Officer Head, then, was in a regular patrol wagon, and

11 the others in a patrol car. Is that correct?

12 A That is right.

13 Q And after you called the station to have those two

14 units brought in, what did you next do?

15 A I returned back to headquarters. And I pulled

16 Lieutenant Head from the desk, left Captain Doyle at the desk,

17 and called Lieutenant Head, and we immediately went to the bus

18 station.

19 Q When you went to the bus station, you had Lieutenant

20 Head from headquarters. Is that correct?

21 A Correct.

22 Q And patrolman Head, who had charge of the patrol wagon?

23 A Yes, sir.

24 Q And, then, car 24, officers Meecham and Guthrie?

25 A That is right.

26 Q Did you take anyone else with you at the time?

27 A Officer Dent. We had him walking downtown in the

28 neighborhood of the bus station. And I seen him there on the

29 corner of Fannin and Edwards as we drove up, and I motioned for

30 him to come over.

1 Q All right. Then, when you got there what did you do
2 and where did you assign the men?
3 A I stationed Officer Meecham and Guthrie at the west
4 entrance of the bus station, Lieutenant Head at the south
5 entrance of the bus station, and Officer Head and Officer Dent
6 at the east entrance of the bus station.
7 Q Now, is the east entrance of the bus station where
8 the buses leave out from?
9 A Leave out.
10 Q The south end of the bus station, is that the front
11 or the rear of the station proper?
12 A It is the front.
13 Q And on what street is that?
14 A It faces Fannin Street.
15 Q And the west area, what area is that?
16 A That is the area where the buses come in to unload.
17 Q And who did you have stationed there?
18 A I had Officer Meecham and Guthrie.
19 Q Then, what did you next do?
20 A Well, I went inside in the waiting room and checked
21 things to look around.
22 Q And, then, what took place next while you were there?
23 A Well, nothing took place till after a few minutes
24 before five o'clock. Chief Teasley came to the bus station with
25 Major Thomas and Major Richards.
26 Q And, then, what did you see or observe next with refer-
27 ence to this case?
28 A Well, about five, five-forty-five, if I am correct,
29 to the best of my knowledge, four colored people, two men and
30 two women, came in through the west entrance of the bus station.

1 Q Do you see those people here today?

2 A Yes, sir. I think I see all four of them.

3 Q Where are they seated?

4 A Seated behind Stone.

5 Q Behind their counsel?

6 A Behind the counsel.

7 Q Now, did you know any of those people before?

8 A No, sir.

9 Q Now, what did you see and observe that took place from
10 the time you first saw them approaching the west entrance to the
11 bus station?

12 A Well, Chief Teasley, Major Thomas, and myself and
13 several other officers were in the center of the waiting room
14 of the bus station talking and we turned around. The colored
15 people come up, and Chief Teasley stopped them, and asked them
16 where were they going. They said they were going to the ticket
17 department there and get some information. And he told them
18 they were crowding up there and creating a disturbance, for them
19 to leave. And they refused to leave. He asked them several
20 times there to leave, and he told them if they didn't leave
21 they would be arrested. They said, "Well, we will just have to
22 be arrested." When they refused to leave.

23 Q That was four colored people?

24 A Four colored people.

25 Q How many were men and how many were women?

26 A Two men and two women.

27 Q How many times, Major Giglio, did you hear Chief
28 Teasley order them to move on?

29 A He told them several times, more than four times;
30 four, five, or six times, something like that. He talked to

1 them there seemed like two or three minutes.

2 Q What was the final result?

3 A The final result was they refused to leave and Chief

4 Teasley put them under arrest.

5 Q Now, that location of the 408 Fannin Street that you

6 have described, is that in Caddo Parish?

7 A Yes, it is.

8 MR. RICHARDSON: The witness is tendered.

9 CROSS EXAMINATION

10 BY MR. STONE:

11 Q Major Giglio, you said that you and Major Thomas and

12 Major Richards and Chief Teasley were in the bus station?

13 A The bus station.

14 Q And that four defendants, that four of these defend-

15 ants came into the bus station. Is that correct?

16 A Correct.

17 Q And as I ask them to stand up, would you tell me

18 whether or not the person that I point to was there?

19 Will you stand up?

20 I am pointing to Harry Blake. Was Harry Blake present

21 in the bus station?

22 A I don't think he was.

23 Q Did you see him at any time in the bus station on that

24 evening?

25 A Well, I don't know. There were four people there, and

26 I just glanced at them and looked at them. I never seen them

27 before in my life.

28 Q Was he one of them?

29 A I don't think he was.

30 Q You don't think he was?

1 A I don't think he was.

2 MR. STONE: All right. You may sit down.

3 Will you stand up, please?

4 Was this man that I am pointing to in the bus station?

5 THE WITNESS: Yes, I think he was one of them.

6 BY MR. STONE:

7 Q Do you know his name?

8 A I do not.

9 Q Can you be sure whether or not this man was in the

10 bus station?

11 A He resembles the man that was in the bus station.

12 Q He resembles the man who was there? Can you say on

13 your oath, Major -- and you are under oath at this time -- that

14 that man was in the bus station?

15 A Yes, he was.

16 Q He was?

17 A He sure was.

18 Q You cannot say under oath that the other man who just

19 sat down was there?

20 A No.

21 MR. STONE: Will you sit down?

22 Will you stand up?

23 BY MR. STONE:

24 Q I am pointing now to Deloris McGinnie. Will you tell

25 me whether or not this young lady was in the bus station?

26 A She was there.

27 Q You can swear that she was there?

28 A She was there.

29 MR. STONE: Will you sit down, now?

30 Will you stand up?

1 BY MR. STONE:

2 Q I am pointing now to Marie McGinnie. Can you swear

3 on your oath that she was there?

4 A She was there.

5 Q I am pointing now to David Dennis. Can you swear on

6 your oath that David Dennis was there?

7 A He was not there.

8 Q Did you see him there at any time prior to the time --

9 A (Interrupting) I never did see him.

10 Q You never did see him?

11 A No.

12 Q And you can testify that he was positively and defin-

13 itely not there?

14 A He definitely was not in the bus station at that time.

15 MR. STONE: All right. Will you stand up, please?

16 BY MR. STONE:

17 Q Was this man that I am pointing to now in the bus

18 station?

19 A I think he was.

20 Q Do you know who he is?

21 A I don't know him.

22 Q Can you say positively that he was in the bus station?

23 A I believe he was.

24 Q And you can swear to that on your oath?

25 A I would swear to it.

26 Q So, then, there are two people here that, according

27 to your testimony, were not present in the bus station. That

28 is this man, Harry Blake, and David Dennis?

29 A That is right.

30 Q And you were there from the time that these persons

first entered until the time that the arrest was made, and these people were carried to the police station or to the jail?

A That is right.

Q Is that correct?

A That is correct.

Q Now, Major, you say when they came in that they came into the bus station, into the waiting room?

A Yes.

Q And they headed toward the ticket window?

A Well, the come toward us. We were there in the center. We was in the center of the bus station, and they walked toward where we were standing.

Q Did they say anything to you?

A No. Chief Teasley approached them and asked them where they were going.

Q Did they come in orderly?

A They come in orderly.

Q As if they were going some place or wanted to go some place?

A Well, I guess so. I don't know what they had in their mind.

Q You didn't see anything wrong with the manner in which they came in the bus station, did you?

A No; nothing only they were just crowding up.

Q Four people?

A Four people.

Q Major, there were more than four police officers in the bus station, then, weren't there?

A Yes, there were.

Q Would you say they were crowding?

1 A No, they weren't, because they were separated.

2 Q And these people walked in together, going toward

3 the ticket counter, and you stopped them?

4 A That is right.

5 Q Because they were crowding?

6 A That is right.

7 Q How large is that waiting room, Major?

8 A Oh, I don't know. I have never measured it. I imagine

9 it is about twenty-five feet wide. It could be more or it could

10 be less.

11 Q Plenty adequate to seat four people, wouldn't you say?

12 A Oh, yes. If you have got good eyes you can see four

13 people.

14 Q You could seat twenty-five or thirty, couldn't you?

15 A I imagine so. It would be pretty crowded.

16 Q How many people were present in the bus station at

17 that time?

18 A Oh, they had a few people sitting down. I couldn't

19 say how many.

20 Q They weren't packed in there like they are in this

21 court room, were they?

22 A No.

23 Q There was plenty room in there, wasn't there?

24 A I wouldn't say there was all that much room.

25 Q But, there was room for these four?

26 A Yes, it was room.

27 Q Major, why did you arrest these people?

28 A Because the Chief ordered for them to leave and they

29 was creating a disturbance there and ganging up.

30 Q Why did the chief order these people to leave, Major?

What had they done?

A They was crowding in a gang there, and it was creating a disturbance.

Q Well, you just said a minute ago they were coming into the building. Isn't that correct?

A Yes, but any crowd will attract attention there.

Q And these four coming into the building attracted your attention, merely because they were just --

A (Interrupting) We didn't know what they had come there for. We had done got a call.

MR. STONE: Now, we object to what somebody told him over the telephone, if Your Honor please.

MR. RICHARDSON: If the Court please, he has asked him why did Chief Teasley order them to leave. He has asked him to give his opinion. I have made no objection, so he is entitled to give his opinion.

MR. STONE: If Your Honor please, I am asking him to tell me what was done in the presence of these officers that could have caused these officers to arrest these people for intending to provoke a breach of the peace.

THE COURT: If you are asking him why he arrested the people, I am going to instruct him to answer the question truthfully. If you don't want to know --

MR. STONE: (Interrupting) Yes, sir, I want him to tell us why he arrested these people.

THE COURT: You are instructed to answer the question and tell the Court why these people were arrested.

THE WITNESS: In the first place, we wouldn't have been there if we hadn't got the anonymous telephone call that there was going to be trouble at the bus station, and for us to

1 have plenty policemen there. And the only thing that we seen
2 where trouble could come from were these four people in the bus
3 station. And Chief Teasley asked them to leave several times,
4 and they refused to leave.
5 BY MR. STONE:
6 Q Major, did anybody else come in the bus station while
7 you were there?
8 A No, they sure didn't.
9 Q Youasked four people to leave who came in the bus
10 station and, yet, you say there were other people in the bus
11 station at the time. Did you ask them to leave?
12 A They were already there.
13 Q Did you ask them to leave?
14 A They were already there.
15 Q Did you ask them to leave?
16 A No, we didn't.
17 Q Major, were they white people or colored people?
18 A White people.
19 Q And when the four negroes came in you asked them to
20 leave?
21 A That is right.
22 Q Major, isn't it a fact that you asked these people to
23 leave because they were negroes?
24 A No.
25 Q What exactly did the chief say to these people when
26 he directed them to leave?
27 A I just couldn't tell you word by word what he said.
28 I don't remember that word by word, what he said. He asked them
29 where they were going, and they told him --
30 Q (Interrupting) Where did they tell him they were

1 going?

2 A That they were going to the ticket office to find out

3 what time the bus leaves.

4 Q And what did he say then?

5 A The chief told them that they will have to leave and go

6 back around to the other side.

7 Q Go back around to the other side?

8 A Uh-huh, and they could find out over there.

9 Q What was the other side?

10 A Because they were ganging up there and creating a

11 disturbance.

12 Q What was the other side that he was talking about?

13 A I don't know what other side he was talking about.

14 Q Did they know?

15 THE COURT: Just a minute. That has gone about far

16 enough. YOu do know what other side he was talking about.

17 (Laughter among the spectators in the court room.)

18 THE COURT: Let me say this: Because of the crowded

19 condition of this court room, it is absolutely necessary that

20 you restrain yourselves and refrain from all noise and outbursts.

21 If another outburst occurs I will clear the court room. Is

22 that understood. I think you are all interested in the case.

23 You are entitled to be here, and see and hear the proceedings,

24 but this Court willnot be slowed down, and we willmaintain order.

25 If there is another outburst the court room will be cleared.

26 Now, you are instructed to answer the question

27 truthfully. What other side?

28 THE WITNESS: Well, Chief Teasley didn't mention the

29 other side being the colored section. He just said there is

30 two sides.

1 THE COURT: What are they?

2 THE WITNESS: One for the colored and one for the

3 white. He just told them to go to the other side.

4 THE COURT: Do you understand what I am telling you?

5 Answer the question when you are asked.

6 THE WITNESS: All right.

7 BY MR. STONE:

8 Q And he told them to go to the other side?

9 A Other side. I surmised he meant the colored section.

10 Q So, he actually stopped these four negroes because they

11 came into the white waiting room. Isn't that correct, Major?

12 A Well, they come into the white waiting room, just like

13 I say. Now, we got that call that there was going to be some

14 trouble there, and the thing for us to do, it looked like, if any-

15 one looked like was coming there that could be the cause of

16 creating a trouble, the thing for us to do was clear them out.

17 Q But, you didn't see any trouble, did you, Major?

18 A At the time we didn't see no trouble; no.

19 Q And these people came in there just as orderly as they

20 could be,didn't they?

21 A Yes, they did.

22 Q And headed toward the ticket window, did they not?

23 A That is right.

24 Q And, then, the chief told them to go to the other side?

25 A The other side.

26 Q And he told them to go to the other side because they

27 were negroes in a white waiting room, didn't he?

28 A No, he didn't mention that. If he did I didn't hear it.

29 Q It would have been perfectly all right, then --

30 A (Interrupting) I didn't hear those words if he did

1 mention it.

2 Q But, it would have been perfectly all right under your

3 appreciation of the circumstances and facts if these four people

4 had gone around to the other side and approached the window in

5 the other side, wouldn't it?

6 A Yes, it would have.

7 Q You would not have arrested them?

8 A Providing they wasn't creating a disturbance.

9 Q Would they have created a disturbance if they had done

10 that?

11 A No, they wouldn't if they had done that.

12 Q So, the real disturbance you are talking about is the

13 fact that these people, these negro people, came into this

14 white waiting room. Isn't that true?

15 A That is right.

16 Q You say that is correct?

17 A That is, and we had got the anonymous call.

18 Q Now, Major, didn't these people, each of these people,

19 have tickets?

20 A I don't know.

21 Q To ride to Jackson, Mississippi?

22 A I didn't check to see whether they had tickets or

23 not.

24 Q Did they offer to produce their tickets?

25 A Not as I remember.

26 Q What did they say?

27 A They wanted to know what time the bus leaves. That

28 is what they asked Chief Teasley. Chief Teasley asked them what

29 was they doing there, and they said they wanted to go to the

30 ticket window to find out what time the bus leaves. Now, whether

they had tickets or not, I don't know.

Q I would like to ask you one other question. I think this will probably be the last question I will have. I don't know. You have indicated that the chief has said two different things, gave two different instructions to these people. You indicated at one time that the chief said for them to move on. You later indicated that the chief told them to go around on the other side.

A Well, that --

Q (Interrupting) Now, which did he do?

A Both. That was during the process of the conversation.

Q Did the chief ever tell them anything about the law, the state law or anything of that nature?

A If he did, I don't remember.

Q And it is your testimony that at no time were these defendants disorderly. Is that correct?

A That is correct.

Q They were never disorderly?

A No.

Q In fact, they did not disturb the peace, did they?

A Not create any disturbance.

THE COURT: Just a minute. That is the ultimate question for the Court.

BY MR. STONE:

Q As far as you could see, they did not create any disturbance of any kind, did they?

A No.

Q Did you say "no"?

A No.

Q And, as far as you could see from their actions and

1 the circumstances surrounding their actions, they did absolutely
2 nothing with intent to provoke a breach of the peace. Is that
3 correct?
4 A No, at the time I was there, they didn't.
5 MR. RICHARDSON: Just a minute. I still think that is
6 a matter for the Court to decide after the case is all heard.
7 THE COURT: That is the ultimate question for the Court
8 to decide.
9 MR. STONE: I am sorry, sir. I will withdraw the ques-
10 tion. I am sorry.
11 BY MR. STONE:
12 Q As a police officer, Major, how many years have you
13 been on the force?
14 A Thirty-one years.
15 Q Did you see them do anything that would have led you
16 to believe as a veteran police officer of thirty-one years that
17 these people intended to breach the peace and provoke an incident?
18 A Well, at the present time, there, we didn't, because
19 you never know what could happen afterwards.
20 Q But, they did not, as far as you could tell?
21 A No.
22 REDIRECT EXAMINATION
23 BY MR. RICHARDSON:
24 Q Major, what caused you to go down there with those
25 officers that morning?
26 A Well, Captain Doyle called me, give me a call on the
27 radio, and he related to me that he had received --
28 MR. STONE: (Interrupting) I am sorry. Go right
29 ahead.
30 THE WITNESS: He received an anonymous telephone call

1 from someone that they were coming to the bus station about
2 five-fifteen, and that to have plenty of policemen there.
3 Q Well, now, you had no plans to go there until you got
4 that information from Captain Doyle. Is that correct?
5 A That is right.
6 Q And you yourself are not in the habit of taking four
7 or five or six officers down there. Is that correct?
8 A That is right.
9 Q At the time you received the information that you have
10 related from Captain Doyle, had you received any information
11 from Chief Teasley or not?
12 A No, I had not.
13 Q If you had received similar information from Captain
14 Doyle of that nature or at any other spot, would you have done
15 the same thing and taken officers there?
16 A I certainly would have.
17 Q And have you, during the course of your experience,
18 had occasion to do that very thing?
19 A I have on different occasions; not like this; some-
20 thing different.
21 Q Well, I understand that, but where a disturbance was
22 imminent, you did take officers to other places. Is that right?
23 A That is right.
24 Q Would you just tell the Court what some of those places
25 have been?
26 MR. STONE: If Your Honor please, we object to that as
27 irrelevant and immaterial.
28 MR. RICHARDSON: I am simply showing that it was a
29 regular police procedure, that he was following in that case,
30 that caused him to believe that there was a breach of peace

1 imminent, that people were going to go some place with intent
2 to breach the peace. And it is the same thing in this case as
3 in other cases, where he received similar calls.
4 THE COURT: It is self-evidence. I don't believe
5 you need to adduce evidence on the point. The objection is
6 sustained.
7 BY MR. RICHARDSON:
8 Q I believe I asked you, Major Giglio, you had not been
9 in contact with Chief Teasley that morning. Is that correct?
10 A No, sir, not until -- I called him.
11 Q And when you called him did you call him with refer-
12 ence to the call from Captain Doyle?
13 A Correct.
14 Q When you went to the bus station did you get there
15 first or did Chief Teasley get there first?
16 A No. I arrived first with my men.
17 Q And did you happen to notice who came with him?
18 A Major Thomas and Major Richards.
19 MR. RICHARDSON: The witness is retendered.
20 REGROSS EXAMINATION
21 BY MR. STONE:
22 Q Major, in your thirty-one years, you have gotten lots
23 of calls and sent policemen off on many different errands, haven't
24 you?
25 A I surely have.
26 Q Many of them have proved fruitful; that is, that you
27 were there and prevented a breach of the peace, and other things.
28 Is that correct?
29 A That is right.
30 Q Many of them have proven to be false alarms, haven't

1 they?

2 A That is right; they have.

3 Q The fact about it, you have had people to call you and

4 ask you to be at a place, not because they intended to breach

5 the peace, but because they wanted to see that nobody else

6 breached it. Isn't that correct?

7 A That is right.

8 Q For an example, Major --

9 THE COURT: (Interrupting) That is the very thing

10 you objected to the prosecution going into.

11 MR. STONE: If Your Honor please, we will withdraw

12 the question.

13 BY MR. STONE:

14 Q The only thing that, as far as you were able to tell,

15 to indicate that a breach of the peace might have been imminent

16 was the call you got that somebody in a police station got over

17 the telephone. Is that right?

18 A That is right.

19 Q Major, who were the officers who were stationed on the

20 door?

21 A On the door? I repeat again, on the west side was

22 Officer Meecham and Guthrie.

23 Q Now, is that the west side of the door?

24 A The west side of the building.

25 Q Major, did you have police officers stationed at the

26 door of the colored -- the so-called colored waiting room at the

27 bus station?

28 A Well, there were police officers there.

29 Q Were they stationed at the door?

30 A They were not my men.

1 Q Did you specifically station anyone at the door of the
2 colored waiting room?
3 A No.
4 Q Did you specifically station any police officer at the
5 door of the white waiting room?
6 A No, I, myself, didn't.
7 Q You stood there yourself?
8 A No, I did not. It was already officers there.
9 Q Oh, I see. To your knowledge, there were officers sta-
10 tioned at both doors?
11 A They was in front of the doors.
12 Q In front of both doors?
13 A In front of both doors.
14 Q Do you know who those officers were?
15 A They were men from the sheriff's department. Some of
16 them I don't know personally.
17 MR. STONE: We have no further questions from Major
18 Giglio.
19 REDIRECT EXAMINATION
20 BY MR. RICHARDSON:
21 Q Major Giglio, when you got down there you said there
22 were some sheriff's officers already there?
23 A Yes, sir.
24 Q Did you have any part in assigning those men?
25 A No, sir, I did not.
26 Q Now, in answer to defense counsel's questions awhile
27 ago you stated just a portion of the phone call as related to
28 you by Captain Doyle to the effect that there was going to be
29 some trouble, and requested plenty of police officers to be there.
30 Is that correct?

A Plenty of police officers to be there.

Q Do you often receive calls such as that, that something is going to happen, and to be sure and have plenty of police officers there?

A We receive calls sometimes that there is going to be a gang fight at different places, or there is going to be a fight here or something like that; but it is very rare that we receive a call stating to have plenty of police officers there. It is very rare to get a call like that of that nature to have plenty of police officers there.

Q Then, in your experience would this particular call be usual or unusual?

A It would be very much unusual, having plenty of police officers, because it sounded alarming.

MR. RICHARDSON: The witness is retendered.

MR. STONE: I have no further questions.

(Witness excused.)

JERRY COLES THOMAS

called as a witness on behalf of the State, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RICHARDSON:

Q Please state your name and occupation.

A Jerry Coles Thomas, Major, Shreveport Police Department.

Q How long, Major Thomas, have you been with the Shreveport Police Department?

A The first of the month will be twenty years.

Q On the morning of August 4th of this year, did you have occasion to go to the Continental Trailways Bus Station, 408 Fannin Street, Shreveport, Louisiana?

A Yes, sir, I did.

Q And whom did you go with?

A I went down by myself.

Q And what was the occasion of your going?

A Chief Teasley had called me at home and asked me to come on down.

Q About what time of morning was that?

A Around there between five or five-fifteen a. m.

Q Now, would you tell us, please, sir, what you saw and what you did from the time you first arrived? Were you in uniform and were you on duty?

A I was in uniform, and first went on in the bus station and had coffee in there. And I was in and out around the bus station until an automobile arrived in the alley.

Q Now, when the automobile arrived in the alley, where were you standing at that time?

A I was standing on the west side of the bus station on the driveway there.

Q Is that where the buses kind of come in and unload generally?

A Yes, sir.

Q And the west side, would that be on the left-hand side as you face the building?

A Yes, sir.

Q Tell us what you saw with reference to that car.

A I saw a '57 Oldsmobile, two-tone blue, drive up. And as they drove up Dennis was driving the car.

Q Who is Dennis?

A He is the light colored boy there.

Q Is that one of the persons on trial today?

A Yes, sir.

Q David James Dennis?

A Yes, sir.

Q And he was driving the car?

A Yes, sir.

Q Now, was that on the bus station property?

A He came down the alley in the rear of the bus station, traveling east. And as he approached the bus station he just pulled over into where you park in the back, still headed east.

Q Still parallel to the alley?

A That is right. And as the door came open I went on inside of the bus station.

Q Could you tell how many people were in that car?

A There were six people.

Q Did you see anyone else that you recognize today in the car?

A Yes, sir.

Q Will you point them out or tell where they are?

A Dennis and Blake was in the front seat.

Q Now, which one is Blake?

A Blake is the one right here on the end.

Q The one seated nearest Mr. Bolin and myself?

A That is right, sir.

Q And he was on the front seat with David James Dennis?

A Yes, sir.

Q And, then, you stated that the car stopped parallel to the alley on the parking lot, the north side of the bus station?

A Just about half in the alley and about half on the parking lot.

1 Q Now, then, you stated as they were fixing to open the
2 door you went in the station.
3 A That is right, sir.
4 Q And which door was open, front or rear?
5 A Right front door.
6 Q Did you see who was seated there about to open that
7 door?
8 A The Reverend Bethune.
9 Q Is that one of the men on trial, Harold L. Bethune?
10 A Next to Blake there.
11 Q Sitting next to Blake?
12 A Yes, sir.
13 Q It would be on Blake's left?
14 A Yes, sir.
15 Q And after you saw that car stop with those people in it,
16 were there people in the back seat?
17 A Yes, sir.
18 Q Do you see those people today?
19 A There was two women and another colored boy back
20 there, but I didn't really know what they looked like till they
21 got in.
22 Q Now, what did you next do?
23 A I went on inside of the station and waited till they
24 came in.
25 Q Then, just tell us, please, Major Thomas, what took
26 place then with reference to this case.
27 A Bethune and the two McGinnie girls and Taylor came up
28 to the west door.
29 Q Could you see that from the inside?
30 A Yes, sir. And they stopped and talked to Officer Meecham

1 for about a minute. Then, they opened the door and came on in.
2 Q Then, what took place next?
3 A They came on in and as they was approximately in the
4 center of the bus station Chief Teasley walked over to them. I
5 didn't hear his first words that he said to them. I first heard
6 when Bethune told him that he wanted to buy some bus tickets.
7 Chief told him that he could buy them around on the other side.
8 He said that he wanted to check the schedule then. The chief
9 told him then he would check the schedule around the other side
10 when he bought his ticket.
11 A He said, "Well, I want to use this waiting room." So
12 the chief said, "Well, I am asking you to leave." And he said,
13 well, he had a right to be in there, according to the I. C. C.
14 ruling or something to those words. The chief says, "Are you
15 going to violate the city and state laws?" He says, "I have
16 no other choice, no other choise." The chief says, "I am asking
17 you again to leave." And he said, "I have no other choice but
18 stay and if it means arrest tobe arrested." And at that point
19 the chief arrested him.
20 Q Do you know how many times you yourself heard the chief
21 ask them to leave or move on?
22 A It was approximately four times.
23 Q Now, that waiting room that was there, have you looked
24 at the sign on the outer door of the waiting room?
25 A Yes, sir.
26 Q You have seen these pictures, of course, have you not?
27 A Yes, sir.
28 Q And after that conversation, whattook place next?
29 A He told them they was all under arrest and they came
30 right on out, back out the west door and waited there just, oh,

1 approximately two or three minutes till the paddy wagon pulled
2 up and they was all put in the wagon and carried to the Caddo
3 Parish jail.
4 Q Now, you did not go with the paddy wagon. Is that
5 correct?
6 A No, sir.
7 Q What did you do next?
8 A Next, we were standing there and I believe it was
9 Captain D'Artois saw the blue Oldsmobile that brought them up
10 sitting over in the 400 block of Travis Street.
11 Q Now, let me ask you, Major Thomas, assuming that Fannin
12 Street runs east and west, although it doesn't exactly, is Travis
13 Street the next street to the east parallel to that?
14 A Travis Street?
15 Q The next street south, I mean.
16 A South, yes, sir.
17 Q And also runs east and west?
18 A Yes, sir.
19 Q Now, what buildings, if any, are between the front
20 entrance of the bus station and the place where this car was?
21 MR. STONE: If Your Honor please, we object to that
22 on the basis of its having no relevancy, no legal relevancy to
23 the question of whether or not these defendants disturbed the
24 peace by being present in the bus station, and refusing to
25 move on. If Your Honor please, the affidavit or bill of infor-
26 mation charging these defendants charged them specifically with
27 intending to provoke a breach of the peace by crowding or con-
28 gregating within the bus station properties, and even desig-
29 nating by municipal number. But we don't think that the rela-
30 tionship of a bus station to some other building in the city

1 would have any legal relevancy whatever to this.

2 MR. RICHARDSON: If the Court please, the prosecution,

3 as I am sure counsel knows, and I will state, of course, to the

4 Court, insofar as David James Dennis and Harry Blake are con-

5 cerned as principals being accessory before the fact and aiding

6 and abetting, and bringing them down there. And there is a

7 purpose of showing intent, showing the intent with whith they

8 went and that a breach of the peace might be occasioned. I am

9 simply endeavoring to show where Blake and Dennis were immediately

10 after the incident transpired.

11 MR. STONE: If Your Honor please, in reference to

12 Blake and Dennis, we submit that the only way they can be found

13 guilty on the basis of evidence adduced here today, and on the

14 basis of this bill of information is that they put Blake and

15 Dennis inside the bus station, and then show that they had this

16 intent and refused to move on.

17 THE COURT: The objection is overruled.

18 MR. STONE: If Your Honor please, we wish to take

19 exception to that ruling of the Court, and assign as our reasons

20 for it the basis given originally in the objection at the time

21 it was posed. Now, if the clerk does not have it, I would like

22 to have it read to him from the record, because we do want this

23 in the bill, because our appreciation of the law is that we must

24 assign our reasons for --

25 THE COURT: (Interrupting) I think that is correct,

26 but the court reporter has taken down what has transpired, and

27 you may perfect your bill at a later time. She may give it to

28 the clerk if that is all right. The objection is overruled.

29 BY MR. RICHARDSON:

30 Q Now, Major Thomas, my question to which I think you

1 answered originally, was to describe what buildings there are,
2 if any, between the front entrance to the bus station on Fannin
3 Street and the place where you saw the automobile in which Blake
4 and Dennis were in over on Travis Street, a block away.
5 A When I saw them I was standing in the driveway on the
6 west side, which is nothing but parking lots. It is wide open.
7 It was early in the morning, and possibly maybe one or two cars
8 parked on the lot, if that.
9 Q Very few cars on that lot?
10 A That is right.
11 Q Is that lot open all the way from Fannin Street on the
12 north side to Travis Street on the south side?
13 A That is right, sir.
14 Q When you saw that car is that the same car you saw
15 earlier, a few minutes earlier?
16 A Yes, sir.
17 Q What did you do?
18 A Captain D'Artois and Lieutenant Pittman of the Sheriff's
19 office and myself got in Captain D'Artois' car and rode over there.
20 Q And tell us what you found when you got over there.
21 MR. STONE: Now, just a minute, please, sir. If Your
22 Honor please, we wish to object to any testimony and to -- in
23 fact, to this whole line of testimony, because it tends to show
24 that Blake and David James Dennis aided and abetted these de-
25 fendants in the offense with which they are charged. To that
26 extent, the evidence tends to enlarge the bill of information
27 on charging these defendants. Has His Honor read this bill?
28 THE COURT: I have seen the bill.
29 MR. STONE: Well, if His Honor has, His Honor knows
30 that this bill charges these defendants with unlawfully attempting

to provoke a breach of the peace by crowding and congregating in the bus station and refusing to move on when ordered to do so by police officers.

THE COURT: Your objection is noted, and you may reserve another bill to the receipt of this evidence for the reasons that you have just expressed, although they are probably the same as those reasons previously expressed in your other objection. The time, of course, for raising this matter is on a motion for a bill of particulars. I understand other motions have been filed previously, and have been argued and have been ruled on by another judge of this court. We are not going back into the same matter. I don't know whether you asked for this information in your motion for a bill of particulars, but all of the previous motions have been ruled on. In the absence of a motion for a bill of particulars asking for this information, the bill is properly drawn.

MR. STONE: If Your Honor please, I would like -- I don't want to belabour this matter, but I would like to point out to the Court in the interest of justice that the record will indicate that specifically in the bill of information -- I mean the motion for a bill of particulars, we ask specifically the manner in which these defendants were alleged to have breached the peace. And, of course, the only answer that we were able to get, the one that the judge ruled was sufficient, was that these defendants with intent to provoke a breach of the peace crowded and congregated on the premises as specified in that bill of the bus station, and refused to move on when ordered to do so. And these defendants here now could not possibly have come to court today knowing that they were going to be -- that the state was going to be permitted to offer evidence as to the -- in substantiation of their

1 guilt as to their whereabouts at some time other than in that
2 bus station. We think that we are being put at a tremendous
3 disadvantage, and we think that moreover under the law this
4 coult not constitute anything other than an enlargement of the
5 pleading, and we feel that it most certainly can result in a
6 miscarriage of justice. And that is why we are so strenuously
7 opposed to this line of questioning and this testimony at this
8 time.

9 Now, we asked for everything that we possibly could,
10 according to our way of seeing it, in the motion for a bill of
11 particulars. And this Court ruled -- this court, through His
12 Honor Judge O'Neal, ruled that this bill of information was
13 sufficient to charge the crime of disturbing the peace. And if
14 that is so, then, I don't see how we can go outside the bill
15 and bring people in here because they may have been down by the
16 bus station and say, then, that they are guilty of disturbing
17 the peace by crowding and congregating in the bus station.

18 THE COURT: I think the record reflects your objection
19 now adequately. I am not going into the motion for a bill of
20 particulars that has been previously argued and submitted and
21 ruled on by another judge of this court.

22 Now, at this time your objection is overruled. The
23 exception is noted, and you may reserve a bill of exception.

24 MR. STONE: May I ask the Court -- I am not going to
25 attempt to go into that matter, but may I ask the Court if the
26 Court is ruling -- I want to be sure I understand the ruling of
27 the Court. If the Court is ruling that under the bill of infor-
28 mation as it is drawn that Harry Blake and David Dennis can be
29 convicted of the offense, even though they are not shown to be
30 present in the bus station, and are not shown to have refused the

the order of the police, if that is so, then, I won't --

THE COURT: (Interrupting) If they are shown to be principals, they can be convicted under the bill as drawn.

MR. STONE: Notwithstanding the facts that I have just mentioned a minute ago?

THE COURT: I am not expressing any opinion on your motion for a bill of particulars, but, notwithstanding any other argument which you have made, any person may be convicted as a principal under a bill drawn as this one is drawn.

Proceed.

BY MR. RICHARDSON:

Q Major Thomas, tell us what you found after you got over to the car. Was that the same car you had seen discharging the passengers?

A Yes, sir.

Q And the same men were in it, David James Dennis and Harry Blake; were they in it?

A Yes, sir.

Q And just tell us what you -- the position of the car, and what you did when you got there.

A The car was headed east on Travis Street on the left side of the street, although it is a one-way street. The engine was off, and was parked approximately four feet from the curbing.

Q From the point where that car was parked, is it possible to see the front of the bus station?

A Yes, sir.

THE COURT: Where was the car?

THE WITNESS: On travis Street, Your Honor, 400 block of Travis Street.

THE COURT: In front of the Beck Building?

1 THE WITNESS: No, sir. They have tore down the build-
2 ings all the way through there, and it is parking lots. And
3 early in the morning there wasn't over two cars at the most in
4 the parking lots, and you could see through there.
5 THE COURT: Were they over by this parking garage or
6 the hotel?
7 THE WITNESS: As you know, the Light Company, Southwestern
8 Electric Power Company, is on the corner of Travis and Marshall.
9 THE COURT: Yes.
10 THE WITNESS: And they were just east of the Light
11 Company in front of the parking lot. See, there is a lot between
12 the Beck Building and the light company. It is wide open all
13 through there, all the way through.
14 THE COURT: All right.
15 BY MR. RICHARDSON:
16 Q I show you a picture marked "State 10" and ask you if
17 you recognize the scene depicted in that picture.
18 A Yes, sir.
19 Q Were you present at that time?
20 A Yes, sir. That is me in the back seat right there on
21 the left, beind David Dennis.
22 Q You are sitting in the back seat of that car?
23 A Yes, sir.
24 Q From the time you got over there until you got in the
25 back seat of the car, had the car been moved in any way?
26 A No, sir.
27 Q I show you another picture marked "State 9" and ask
28 you if you recognize the scene depicted in that picture.
29 A Yes, sir, I do.
30 Q Were you present at that time?

A Yes, sir. I am there talking to Chief Teasley.

Q Had the car been moved in any manner between the time you got there until the scene in that picture was made?

A No, sir.

MR. RICHARDSON: May it please the Court, at this time in connection with this witness' testimony I offer in evidence -- I have numbered them in a particular order, but in connection with his present testimony they are identified as "State 9", "State 10". I believe counsel wants to object.

MR. STONE: If Your Honor please, we do object to it. We object to it on the basis that there has been no showing that thispicture contains a true print of the circumstances involving the surrounding area -- I lost my thought. If Your Honor please, what I am trying to say is that there has been no showing that these pictures represent a true picture of the area surrounding this particular car and the other buildings, and so forth, at the particular time of the alleged incident. Now, it hasn't been shown by the prosecutor that this was taken on the day this incident allegedly happened. It hasn't been shown by the prosecutor whether or not, or whether it was taken on a subsequent day. The only testimony as to this particular car -- and there are other people. There are people in this photo, and there are street conditions, in reference to other vehicles being parked on the streets, and so forth. And there isn't any way of looking at this picture and taking it in connection with Major Thomas' testimony and telling whether or not this picture was staged, whether it was planned this way, or whether or not it represents the true situation at the particular time that this incident is alleged to have happened.

THE COURT: I don't see what difference it makes one

way or the other. Do you want to question the witness about the picture further?

MR. STONE: I do want to question him, but I wish the Court --

THE COURT: (Interrupting) Just a minute.

MR. RICHARDSON: I will just ask two questions, Your Honor.

THE COURT: All right.

BY MR. RICHARDSON:

Q Major Thomas, in these pictures, "State 9" and "State 10" do these photographs depict actually what you saw when you were in that picture, in each picture?

A Yes, sir.

Q Is that a true picture of your being in the rear of that car?

A Yes, sir.

Q In one picture seated in the rear and in the other picture standing outside at the rear. Is that a true picture of that scene?

A Yes, sir.

Q That morning at the time that you have testified to?

A Yes, sir.

Q Now, I will also ask you from the time you arrived until the time these pictures were made and these scenes were depicted, had the automobile moved?

A No, sir.

Q MR. RICHARDSON: Now, if the Court please, I believe I have met any technical requirements.

THE COURT: All right. Are there any questions you would like to ask this witness about those pictures?

1 MR. STONE: Yes, sir.

2 THE COURT: I will allow you to ask them.

3 CROSS EXAMINATION

4 BY MR. STONE:

5 Q Major, who made the pictures?

6 A Major Richards.

7 Q Major Richards had his camera with him at the time that

8 he went to the bus station originally?

9 A Yes.

10 Q Were these defendants placed in the car for the pur-

11 pose of taking this picture?

12 A They never got out.

13 Q And who are the police officers in the back of the

14 car?

15 A If you are referring to the one there with Chief Teasley

16 -- is that the one you are referring to?

17 Q Yes, sir, Chief Teasley.

18 A Chief Teasley, George D'Artois, myself, and I believe

19 you will find Lieutenant Pittman walking from on the left side

20 of the car back towards the other side.

21 MR. STONE: Those are all the questions we have at this

22 time.

23 THE COURT: Now, do you object to the admission of the

24 pictures?

25 MR. STONE: Yes, sir, if Your Honor please.

26 THE COURT: On the grounds previously stated?

27 MR. STONE: No, sir. We object to it on that basis

28 and on the further grounds that these pictures have no legal

29 relevancy to what took place in the bus station.

30 THE COURT: The objection is overruled.

MR. STONE: If Your Honor please, we wish to have our exceptions noted, and the bill reserved.

THE COURT: All right. Your exception is noted.

MR. STONE: Of course, the bases for the exception being the same as stated in the objection.

THE COURT: All right.

BY MR. RICHARDSON:

Q Major Thomas, will you tell us now what you did after you got over there, as far as you were concerned, and what you said and what these men said at that time and place?

A I believe Captain D'Artois asked the first question. I believe he asked them what they were doing parked so far away from the curb.

MR. STONE: Now, if Your Honor please, we object to that. The offense with which these people are charged is disturbing the peace by failing to move on in the bus station, when ordered to do so by police officers. And testimony as to the distance they were parked from the curb would have no relevancy to that, Your Honor.

THE COURT: That testimony is not going to be considered in the determination of this case. Go ahead and answer the question.

BY MR. RICHARDSON:

Q Go ahead, Major Thomas.

A And Dennis looked out of the car and he says, "I sure am parked too far from the curb." And, then, they were asked what they were sitting there for. And Dennis replied that he had some friends fixing to catch a bus to Jackson, and he wanted to see what happened. So I asked him how come he didn't see them away up at the bus station. He said there was too many policemen

1 around there.

2 Q And, then, what did you all do next? What did Harry

3 Blake -- did you talk with him?

4 A Yes, we talked to him, asked him numerous questions,

5 asked him what he was doing there. And he stated the same, that

6 he had come with Dennis to bring the people to the bus station

7 to go to Jackson. And asked them where they lived and things

8 like that, and whose car it was, which they said it was Bethune's

9 car.

10 Q It was Bethune's car?

11 A It was Bethune's car. And just numerous routine ques-

12 tions.

13 Q Then, what did you all do next?

14 A Captain D'Artois then went over to the bus station

15 and brought Chief Teasley back.

16 Q And, then, what happened?

17 A And, then, Chief Teasley placed them under arrest.

18 MR. RICHARDSON: The witness is tendered.

19 RECROSS EXAMINATION

20 BY MR. STONE:

21 Q Major, I want to be sure I understand your testimony.

22 You arrested the four defendants who went into the bus station

23 because they went into the white waiting room. Is that correct?

24 A I didn't arrest anybody.

25 Q Why did the chief arrest them?

26 A You will have to ask him.

27 Q You don't know?

28 A No. I can't do his thinking.

29 Q I want to know if you know why they were arrested, Major.

30 Either you do, Major Thomas, or you don't. I am just asking a

simple --

A (Interrupting) I only have my opinion why they were arrested. I can't say.

Q But, you don't know?

A I can't say what the chief's thinking is.

Q I am not asking you what he thinks. I am asking you if you know why they were arrested.

A Well, I could tell you my reasons to think they were. He asked them to move on and they didn't.

Q All right. Then, they were arrested because they failed to move on?

A Yes.

Q When ordered to do so in the bus station. Is that right?

A After he had asked them numerous times.

Q All right. Now, why was David Blake, Reverend Blake here and David James Dennis arrested; why were they arrested?

A Well, that is back to the same thing.

Q Because somebody else didn't move in the bus station?

A They brought them down there, and just as much part of it as the others were.

Q And they never went in the bus station?

A I didn't see them in the bus station.

Q You saw them drive up in the car?

A I saw them drive up.

Q And I believe you say you saw the car leave.

A No, I didn't say I saw the car leave. I couldn't see it from inside where I was.

Q Did you ever see David Blake in the bus station?

A No.

1 Q Did David Blake fail to obey any order that you
2 gave him in the bus station?
3 A I didn't see him in the bus station.
4 Q Did David Dennis fail to obey any order that you
5 gave him?
6 A I didn't see him.
7 Q But, the chief came down and placed them under arrest
8 even though they were some block or more away from the bus
9 station. Is that right?
10 A Arrested them.
11 Q Now, when these people came into the bus station
12 what part were you in, Major? When they drove up, you say you
13 saw them on the outside.
14 A I was on the outside at that time.
15 Q And you were at that moment going into the door?
16 A I went on in as they drove up.
17 Q Did you go in because they drove up or were you on
18 your way?
19 A That is right.
20 Q You went in the bus station because they drove up?
21 A That is right.
22 Q And, of course, you went in to see what they would
23 do, to observe from the inside what they would do. Is that
24 right?
25 A That is right.
26 Q Did you give any instructions to the police officers
27 on the inside?
28 A It wasn't my job.
29 Q Did you tell them that they are here, or anything of
30 that sort?

A I don't remember telling them anything.

Q But, you went in, and then they came in. And, then, you said that Chief Teasley asked them if they were going to violate the city and state law?

A That is right.

Q Did you know what city and state law he was referring to?

A No.

Q Were these people acting in an orderly manner?

A Orderly manner?

Q Yes. Did they come in just as people normally do, or did they -- how did they come in?

A They just came tromping in in a line.

Q They came in in a line?

A That is right.

Q Were they quiet and orderly?

A They were talking.

Q To one another?

A That is right.

Q And they were intercepted by the chief of police or by someone else as soon as they got in the door and were headed toward the ticket window?

A Well, they was approximately in the center of the bus station.

Q Going toward the ticket window?

A That is right.

Q Had they said anything to anybody in the bus station?

A I didn't see them say anything, other than themselves.

Q Did you hear the chief tell them to go around on the other side?

1 A Yes.

2 Q And when he said the other side, do you know what side

3 he referred to?

4 A He pointed right around on the other side.

5 Q What is on the other side, Major Thomas?

6 A The Interstate Passengers and Colored Passengers.

7 Q That is the so-called colored waiting room?

8 A That was what the sign said.

9 Q Major, do you know of your own knowledge whether or

10 not there were other people present in the waiting room in which

11 you were when these defendants came in?

12 A Other people?

13 Q Yes, sir.

14 A Yes, there was other people.

15 Q Other than police and law enforcement officers?

16 A That is right.

17 Q Were they colored people or white people? Were they

18 interstate or intrastate passengers?

19 A I didn't ask them.

20 Q Did you ask these people whether they were interstate

21 or intrastate passengers?

22 A I haven't asked them anything.

23 Q Did the chief of police ask them whether or not they

24 were inter- or intrastate passengers?

25 A These here?

26 Q Yes, sir.

27 A I don't know.

28 Q Did you hear him ask any questions about, "Where are

29 you going? What is your destination?"

30 A No.

1 Q Would you have still arrested these people if they
2 had told you that they were intrastate passengers?
3 M MR. RICHARDSON: If the Court please, we object to that.
4 He didn't arrest the people. The chief of police ordered them
5 to move on and placed them under arrest. He is asking now for
6 this man's conclusion about other things, if this and if that,
7 purely conjectural and hypothetical.
8 THE COURT: Objection sustained.
9 BY MR. STONE:
10 Q Your testimony is, then, that you don't know why
11 Blake and Dennis were arrested. Is that right?
12 A No, that isn't my testimony.
13 Q You do know why, then?
14 A I told you awhile ago they were just as much principal
15 as the other four. They brought them down there and they was
16 part of it.
17 Q They brought these people down to the bus station?
18 A That is right.
19 Q And you arrested them because they brought these
20 people to the bus station. Is that what you are telling me?
21 A I didn't arrest them. The chief arrested them.
22 Q But, are you telling me they were arrested because
23 they brought the people to the bus station?
24 A They were a part of it. They were just as much a
25 part of it as the ones that came.
26 Q What did they do, Major, aside from bringing them to
27 the bus station and sitting there watching to see them off that
28 indicated to you that they were a part of this thing? That is
29 what I am trying to get from you. That is the information I
30 want.

1 A Well, they didn't deny they had brought them down
2 there and they wanted to see them leave.
3 Q And was it on that basis that they were arrested, be-
4 cause they had brought them down there and they wanted to see
5 them leave?
6 A Well, now, you are asking me something here that I
7 didn't arrest them to begin with.
8 Q Well, did you see anything else that they did that
9 could have caused their arrest?
10 A Well, really, if I had wanted to arrest them I could
11 have arrested them for not having any brakes on their car.
12 Q And charged them with disturbing the peace?
13 A I could have charged them with defective brakes. You
14 are asking me did I see anything else.
15 Q Did you see any other reason, then, they could have
16 been arrested for disturbing the peace? Maybe I better put it
17 like that.
18 A At that time?
19 Q At that time.
20 A No, not at that time.
21 Q You say no, not at that time?
22 A Not at that time.
23 Q Other than the fact that they brought these people to
24 the bus station and they waited down there to see them leave?
25 A Yes.
26 Q Did you say that is correct, Major?
27 A That is my part.
28 Q That is correct insofar --
29 A (Interrupting) That is all I know about.
30 Q You said, Major, that they talked with Mr. Meecham at

the door?

A That is right.

Q Do you know what they talked about?

A I do not.

Q You didn't hear any of that conversation?

A Not a bit of it.

Q Did you hear Bethune, Harold Bethune tell the chief of police that he had a ticket, and he wanted some information about when the bus was going to leave?

A He told him he didn't have any ticket.

Q He told him he didn't have?

A Didn't have.

Q Isn't it a fact, Major, that you took from these people, each, a ticket with the destination marked plainly on the ticket?

A I didn't take anything from these people.

Q The chief of police did not ask to see their tickets at the bus station?

A He asked them. They said they wanted to buy tickets. They haven't ever offered that they had any. There would be no reason to shake them down to see if they had them when they said they didn't have.

Q Did you see these people do anything at the bus station other than walk into the bus station that you as a veteran twenty-year man would have arrested them for prior to the time that the chief told them to move on?

A I don't quite believe I understand your question there.

MR. STONE: Would you read the question?

(Whereupon, the pending question was read by the reporter as hereinabove recorded.)

THE WITNESS: Normal circumstances, when the car pulled

1 up back in the back with that grinding noise and the brakes
2 back there, I would have arrested the driver for defective
3 brakes.
4 Q All right. You would have arrested the driver?
5 A That is right.
6 Q What about the other occupants?
7 A I wouldn't have arrested them.
8 Q Did they do anything?
9 A I wouldn't have arrested them.
10 Q In other words, then, until the chief asked them to
11 move on there wasn't anything at all that you would have arrested
12 any of them for with the exception of the driver of the car?
13 A That is right.
14 Q Did you see any disturbance created by these people?
15 A No.
16 Q You did not?
17 A No. There couldn't be too much. There was too many
18 policemen around there.
19 REDIRECT EXAMINATION
20 BY MR. RICHARDSON:
21 Q Major Thomas, during the time while you were there
22 that morning did you see Officer Meecham or anybody else order
23 people to move on and they did move on?
24 A Yes, sir.
25 Q Were they white people?
26 A White and colored.
27 Q And those people when they obeyed the order, they were
28 not arrested?
29 A That is right, sir.
30 Q Was that inside the bus station?

1 A Yes, sir; outside and inside.

2 Q Outside and inside?

3 A Yes, sir.

4 Q Do you know who some of those officers were?

5 A I believe Major Giglio and I believe Lieutenant Head

6 and several of the sheriff's deputies asked them to move on.

7 Q Then, there were quite a few people that were ordered

8 to move on and did obey the order?

9 A That is right, sir.

10 Q Inside and outside the bus station?

11 A That is right.

12 Q White and colored?

13 A Yes, sir.

14 Q And they were not arrested?

15 A No, sir.

16 Q Did you see anybody else that was ordered to move on

17 that refused besides these people?

18 A They were the only ones.

19 Q When you first arrived there did you see any bus

20 come in the back and unload?

21 A Sir?

22 Q Did you see a bus come to the back and unload, an

23 arriving bus?

24 A I don't remember offhand, sir.

25 Q I didn't hear you.

26 A I don't remember offhand.

27 Q The people that were otherwise ordered to move on and

28 did move on and were not arrested, where were they located?

29 A Some were in the interstate waiting room; some was in

30 the intrastate waiting room. Some was out in the streets out

1 there standing around in the front. Some were over in the
2 restaurant.
3 Q So, both in the restaurant and in the intrastate and
4 the interstate waiting room and on the outside and in the res-
5 taurant?
6 A That is right.
7 Q People were ordered to move on and they did do so?
8 A They didn't have any business down there.
9 Q Both white and colored?
10 A Yes, sir.
11 Q None of those were arrested?
12 A No, sir.
13 Q Major Thomas, did you yourself order anybody to move on?
14 A No, sir.
15 Q Give me the names of the officers whom you saw order
16 somebody to move on, please.
17 A Major Giglio.
18 Q Just a minute. Where was Major Giglio when he ordered
19 somebody to move on?
20 A He caught, I believe it was a colored person, I believe,
21 right on the corner.
22 Q On the corner?
23 A Yes.
24 Q In the waiting room or --
25 A (Interrupting) No, outside.
26 Q Outside on the corner?
27 A Yes, sir.
28 Q Did that man have a ticket?
29 A No.
30 Q Did the major ask him?

1 A No. He asked him what he was doing. He wasn't doing
2 anything but just standing there.
3 Q But, he was outside the bus station?
4 A That is right.
5 Q Were you present and did you see and hear what was
6 said?
7 A I didn't see what was said. I just knew that they
8 were checking everybody that was in the vicinity to try to move
9 them on, try to keep them --
10 Q (Interrupting) Can you sit in the chair and swear under
11 oath that Major Giglio asked this man, or ordered this man to
12 move on?
13 A I am sure that is what he was doing. That was what
14 they were assigned --
15 Q (Interrupting) Can you swear that that was what was
16 done?
17 A I couldn't swear that is what he said, no, but I know
18 what their assignments were.
19 Q Can you swear that, Major Giglio ordered anyone to move
20 on?
21 A I can't swear, if you want to say whether I heard what
22 they said, but I know what their assignments were, and I saw
23 them talking to them, and they all moved on. In my own mind I
24 know what they were doing.
25 Q Can you swear that any of those people -- that none
26 of these people that you saw move on after having talked to the
27 police officer had no tickets in their possession and no busi-
28 ness at the bus station?
29 A I presumed they didn't.
30 Q Do you know whether or not the major or anybody else

ordered anybody to move on who had tickets in their possession?

A I don't know of any.

Q Were you people under orders to keep people away from the bus station who had lawful business there?

A That had lawful business there?

Q Yes, sir.

A No.

Q If a man had come to the bus station to catch a bus and waiting near the bus time with his ticket all ready were you under orders to turn such a man away?

A No.

Q If a person came to the bus station on any lawful business whatever were you under orders to turn such a man away?

A No.

Q These defendants -- you did hear these defendants tell the chief of police that they wanted some information at the desk, though, did you not?

A I heard them say they wanted to get the time schedule.

Q Did they have bags with them as if they were going some place?

A They didn't have any grips, I don't believe.

Q Did they have overnight bags?

A They had some kind of small --

Q (Interrupting) They had some kind of luggage?

A Yes.

Q As if they were going some place?

A Well, I don't believe all of them even had luggage.

Q That is kind of vague in your mind, isn't it, Major?

A In my mind, I don't believe over one had a piece of luggage. I believe one had a sack.

1 Q One had a sack?

2 A That is the best I can remember of their luggage.

3 Q And, of course, people travel sometimes from the bus

4 station not having anything, don't they?

5 A They could.

6 Q Was any effort made to see if these people had lawful

7 business at the bus station?

8 A I don't quite understand what you mean. It was asked

9 by the chief.

10 Q Did any police officer make any effort to see if these

11 people had any lawful business down there?

12 A Well, their own statements said they wanted to buy

13 tickets. And they wanted to check the time schedule. I think

14 that was an effort on the chief's part.

15 Q Would you say that was proper business?

16 A If they conducted it properly.

17 Q Did they conduct it properly?

18 A I don't think so.

19 Q In what manner was it conducted improperly, Major?

20 A I would say that it was conducted improperly when they

21 come in the intrastate waiting room.

22 Q When they came in the white waiting room?

23 A That is right.

24 Q That was what made it improper. Is that what you are

25 saying?

26 A That is right.

27 REDIRECT EXAMINATION

28 BY MR. RICHARDSON:

29 Q Major Thomas, did you see people in the interstate

30 waiting room?

A Yes.

Q Did you see people in the intrastate waiting room?

A Yes.

Q And did you see officer Meecham move some white boys away from one area of the intrastate waiting room? Did you see that yourself?

MR. STONE: If Your Honor please, we object to that. That is a leading question. We object that it is --

BY MR. RICHARDSON:

Q (Interrupting) I will rephrase the question. Did you see Officer Meecham move anybody at any time?

A Officer Meecham was one of them that was assigned to move people on that didn't have any business down there.

Q Now, when you said awhile ago you knew what the assignments of the various officers were. Is that correct?

A I know the assignments of most all the officers, what they were.

Q Where did you receive your first knowledge that there might be something coming up at the bus station that morning that would call for a number of officers to be there?

A It was, I would say, somewhere around four o'clock in the morning. I believe it was. It was early, anyhow. It wasn't too much ahead of this.

Q And from whom did you get your call?

A I believe it was Chief Teasley.

Q Then, up until about four o'clock in the morning you had no plans to go down to see about a bus station incident, except that he called you in regular order. Is that right?

A That is right, sir.

Q I show you picture marked "State 1", "2", "3", "4",

"5", "6", "7" and "8" and ask you if you will look at these pictures and see if you can recognize the scenes depicted in those pictures.

A This was inside.

Q I don't want you to describe them. I just asked you do you recognize those scenes as being made that morning at the bus station.

A Yes, sir.

Q Do you recognize officers and people in the pictures?

A Yes, sir.

Q Now, will you look at each picture separately and see if that is true of each picture?

A Yes, sir. This was the morning in the bus station.

Q And I hand you "State 3" and ask the same question.

A Yes, sir, inside the bus station.

Q "State 4", the same question.

A This is the same morning; yes, sir.

Q And "State 5", the same question.

A Yes, sir.

Q "State 6", the same question.

A Yes, sir.

Q "State 7", the same question.

A Yes, sir.

Q "State 8", same question.

A Yes, sir.

Q Now, Major Thomas, are you in a number of those pictures?

A Yes, sir.

Q Do you recognize the people, the various people in the other pictures that maybe you are not in?

A Most all of them; yes, sir.

Q Now, are you able to say that these photographs do or do not correctly show scenes at the bus station inside and out on that morning of August 4th?

A Yes, sir, that is at the bus station on August 4th.

MR. RICHARDSON: I offer the pictures in evidence, if the Court please, simply to show the res gestae to show the whole transaction, show who was there, show these people's pictures and the various officers who have testified and who will subsequently testify.

MR. STONE: If Your Honor please, we object to the offering for several reasons. First of all, we object to it on the basis that none of these pictures represent an accurate view of the premises or of the people who were present, that they all were obviously staged,for an example, in one picture here, this picture contains one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen people. Of the seventeen present the four of the defendants here, one, two, three,four, five, six, seven, eight, nine, ten, eleven, are police officers, or at least they appear to be by their uniforms. Others are police officers whom I know, and a news man. And absolutely none of them show the presence of anybody else in this building. And, despite that fact, the chief of police, not the chief of police -- the major Thomas, Major Giglio, both testified that other people were present. They seem to have been deliberately left out of all these pictures. In none of these pictures so far have I been able to find that those circumstances that are testified to as having prevailed at the bus station at the particular time of arrest appearing in these pictures, other than the fact that they have got pictures of these

1 defendants being led in or led out, rather, or being escorted
2 out, or their coming into the station; but it doesn't show an
3 accurate representation of the surroundings according to their
4 own testimony. And I don't know what the pictures are being
5 offered for. If, of course, they are being offered to show that
6 these defendants were at the bus station, then, we admit that
7 they were there and that they are relevant for that reason. But,
8 if they are offered to show anything else, then, we object to
9 it. They were obviously staged.
10 MR. RICHARDSON: If the Court please, the pictures are
11 not staged. He has already testified that they depicted what he
12 himself saw there and that they are true pictures of the scene.
13 And, as far as their not being other people in there, that is
14 probably as much for the defense as it is for the State. I am
15 just trying to produce everything that transpired that morning.
16 THE COURT: Well, the effort has been made to intro-
17 duce the pictures, and they are objected to. I don't know how
18 anybody can look at those pictures -- I haven't seen them, but I
19 fail to understand how a person canlook at them and say they are
20 obviously staged, especially, someone who wasn't supposed to be
21 there at the time. The objection is sustained. The State has
22 done all it can do, and the defense objected to it, so the de-
23 fense can't complain. I don't know whether it adds anything
24 to the witness' testimony.
25 MR. RICHARDSON: If the Court please, it is simply out
26 of fairness to everybody. I offer the pictures to show what was
27 there. I have a photographer, and I will renew an effort at a
28 later date. I was just trying to save the time of the Court and
29 of the other witnesses.
30 RECROSS EXAMINATION

BY MR. STONE:

Q Major, you said that Major Orval Richards took these pictures?

A That is right.

Q He had his camera with him when he came down there that morning?

A That is right.

Q Do you know what the major's duties were, what duties were assigned to him?

A To take pictures.

(Witness excused.)

ORVAL RICHARDS

called as a witness on behalf of the State, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RICHARDSON:

Q Please state your name and occupation.

A Major Orval Richards, police department.

Q Major Richards, how long have you been with the Shreveport Police Department?

A Twenty-four and a half years.

Q I believe you are also in charge of the finger printing department, and identification.

A Right, sir.

Q Major Richards, did you have occasion on August 4th of this year to go to Continental Trailways Bus Station at 408 Fannin Street under assignment from anyone?

A From the chief, yes, sir.

Q That is Chief Teasley?

A Yes, sir.

1 Q Did he make that assignment to you that morning?

2 A Yes, sir, he did.

3 Q And did you go there by yourself?

4 A Yes, I did.

5 Q And what was your assignment; what were your duties?

6 A Well, to go there and make pictures of any scene that

7 they so desired to have.

8 Q Did you make those pictures?

9 A I did, sir.

10 Q And did you make them on August 4th?

11 A I did, sir. I believe that was the correct date.

12 Q I show you eight pictures marked "State 1" through

13 "8", and ask you if you recognize the prints and your initials

14 on the pictures.

15 A Yes, sir.

16 Q Do you recognize those pictures?

17 A Yes, sir, I do.

18 Q And when you took those pictures, will you just tell

19 the Court where you were and where you took them, and what was

20 said and done insofar as you were concerned?

21 A I could not hear anything of the conversations between

22 any of them, but I was taking the picture of the groups as they

23 were in the station. I was taking --

24 Q (Interrupting) From the time that you arrived until

25 you finished taking these pictures, did you have any instruc-

26 tions about the pictures?

27 A Other than just to get the picture of any group of any

28 disturbance they might have.

29 Q Is that what -- these are the pictures you took in

30 accordance with that?

A Yes, sir.

Q Were any of these people lined up or posed or staged to make the pictures?

A No, sir, they were not.

Q Did you ask any of them to stand in any particular place or move around or anything?

A I did not.

Q Would these be what an amateur photographer calls candid shots, unposed shots?

A Yes, sir, they would.

Q Now, Major Richards, at my request, did you on yesterday go down and make two pictures that are identified as "State 11" and "State 12" which I now hand you and ask you if youmade those pictures and if you recognize them and are those your initials on the pictures?

A Yes, sir, they are.

Q Now, would you tell us where you were standing when you made "State 11"?

A This picture was made -- I was standing on top of the car to get a view completely through from the front of the Journal Building across to the bus station.

Q And is the front entrance of the bus station depicted in that picture?

A Yes, sir.

Q Then, I ask you the same question with reference to "State 12". Where is that picture taken from, and what does it face?

A I was facing south towards the Journal Building standing just a little to the east of the entrance of the bus station on the sidewalk.

1 Q Then, my question is, do these two pictures show
2 opposing views of the parking lot between the bus station on
3 Fannin Street and the Journal Building on the opposite side of
4 Travis Street?
5 A It does, sir.
6 MR. RICHARDSON: Now, if it please the Court, I now
7 in connection with this witness' testimony first offer "State
8 1" through "8", in line with the testimony he has just given.
9 MR. STONE: If Your Honor please, the defense has no
10 objection.
11 THE COURT: Let them be admitted.
12 (Whereupon, the exhibits hereinabove described were
13 received in evidence and filed by the clerk.)
14 MR. RICHARDSON: Now, if the Court please, in connec-
15 tion with this witness' testimony, "State 11" and "12" were
16 taken yesterday showing the parking lot between the front en-
17 trance of the bus station on Fannin Street and the corner of the
18 Southwestern Electric Building and the Journal Building on
19 Travis Street, showing the absence of any buildings in the loca-
20 tion of the parking lot. I offer them at this time.
21 MR. STONE: If Your Honor please, we object to them
22 as having no legal relevance to the offense charged.
23 THE COURT: The objection is overruled.
24 MR. STONE: We wish to have our exceptions noted for
25 the reasons given at the time the objection was made.
26 THE COURT: All right.
27 (Whereupon, the exhibits hereinabove described were
28 received in evidence and filed by the clerk.)
29 MR. RICHARDSON: The witness is tendered.
30 CROSS EXAMINATION

BY MR. STONE:

Q Major Richards, how many pictures did you take, please, sir?

A I believe I made four yesterday and on the 8th I made ten.

Q You made how many?

A Ten.

Q You made four yesterday?

A Correct.

Q You didn't make any more than that, did you, Major?

A No.

Q When I said "made" I mean did you take more than that with the camera.

A That is what I referred to. No, I didn't make any more.

Q They all came out all right, didn't they?

A Yes; that is right.

Q Pretty good photographer, Major. Of course, Major, you were taking pictures of the facts and circumstances that you thought would aid in prosecution, weren't you?

A I was just ordered to take the pictures. I didn't know anything about the prosecution.

Q Did they say pictures of what?

A Any disturbance they might have had, or anything they might have had around there. I shot all those pictures there.

Q Did you photograph any disturbance, Major?

A I photographed the group that was there, is all. I didn't know whether there was any disturbance or whether there wasn't. I just made the pictures.

Q And you were interested primarily in the group and

not in the surrounding area. Is that right?

A I got all the area I could in the photograph. That was all it would take.

Q Of course, it was impossible on the inside of the building for you to have gotten the entire waiting room, wasn't it?

A With the camera that I was using, yes. I could not have gotten the entire waiting room with it.

Q So, then, this photograph, for an instance, that is marked "State 1" shows only a very small portion of the area at the bus station, doesn't it?

A That is correct. It doesn't show all of the bus station.

Q It doesn't show very much of the waiting room, does it, that is, the sitting area of the waiting room?

A Not all of it; no.

Q And there were people in the part that is not shown here?

A I suppose there were.

Q Major, what is this a picture of? I hand you now "State 12".

A This is a picture that I made at the request of the district attorney showing from the bus station over to the Journal Building, which was through a parking lot area.

Q Oh, through a parking lot?

A Yes, sir.

Q All of these are cars that are parked on a parking lot?

A That is correct. There are some on the street and on the parking lot.

1 Q Other than to show that a parking lot is -- we with-
2 draw that question. Now, here is another one, Major,"State
3 Exhibit 2". That picture also shows only a very small portion
4 of the waiting room, and does not show any of the people present
5 other than the defendants and sheriff's officers, I believe,
6 or police officers. Is that correct?
7 A Well, that was--as I said, the camera does not cover
8 the entire room, and the only thing I could get was more or less
9 the group of people who were there.
10 Q That is the police officers and these defendants?
11 A Yes, that is right.
12 Q Of course, Major, do you know Harry Blake?
13 A Yes; I have seen him before.
14 Q David Dennis?
15 A Yes; I have seen him before.
16 Q They do not appear on any of these pictures except
17 the ones that were taken down the street from the bus station,
18 do they?
19 A That is correct.
20 Q Major, I hand you a picture here and ask you -- that
21 is marked "State Exhibit 4". You see Levert Taylor standing
22 here, I believe.
23 A I don't know him by name.
24 Q Do you recognize this person in this picture to be
25 the young man seated on the end over there?
26 A I would take it to be; yes.
27 Q That is Levert Taylor. Would you look at his hands
28 and tell me what he has in his hands?
29 A Well, it looks like he has a handbag in one side and a
30 book in the other.
Q Now, I hand you again the same photograph and I will ask

1 you if you recognize the young lady in the picture to be Deloris
2 McGinnie, the young lady in the blue over there seated near the
3 counsel table.
4 A I would say that is her.
5 Q Does she have anything in her hand?
6 A It looks like a handbag or a purse. I couldn't say
7 which it is.
8 Q If it is a purse it is a pretty large purse, is it not?
9 A That is right.
10 Q Major, I hand you another picture marked "State Exhibit
11 5" and I will ask you if you recognize that young lady as being
12 the same young lady in the other picture, Deloris McGinnie.
13 A I suppose that is.
14 Q Does she have something in her hand there?
15 A Yes. In this picture it looks more like it would be
16 a little overnight case.
17 Q It is an overnight case and not a purse, isn't it?
18 A Yes.
19 Q I hand you now, Major, "State Exhibit 5" and I will
20 ask you if you recognize this young lady to be Marie McGinnie,
21 who is seated at the counsel table.
22 A I would think it would be; yes.
23 Q Does she have anything in her hand?
24 A Yes. As I said before, it looks -- at the angle that
25 this picture is made it looks as if it was a handbag.
26 Q Now, Major, I hand you --
27 A (Interrupting) A purse or a handbag.
28 Q Now, Major, I hand you anotherpicture marked "State
29 Exhibit 8" and I will ask you again if you recognize this as
30 being Levert Taylor.

A Well, it is a side view and I suppose that is the same one.

Q Would you look at his hand again?

A Yes.

Q Now, he has two bags in his hands, does he not?

A That is correct.

Q One is a suitcase, so to speak, or an overnight bag, is it not?

A Well, it is a couple of bags, a small one and a large one. What they are identically, I couldn't say.

Q This one seems to be a shaving kit or something of that sort, carrying toilet articles, does it not?

A I wouldn't know.

Q What does it appear to you to be, Major?

A It is just a little case.

Q A little carrying case of some kind?

A Yes.

Q So, Major, of the four defendants that you photographed there was only one who seemed to have been without either an overnight bag or some kind of bag. Is that correct?

A Of the ones that we have looked at.

Q The ones that we have looked at here?

A Yes.

Q And looking at all of these persons, according to these photographs, they look like persons going somewhere to you, don't they, Major?

A I don't know.

Q Major, did you accompany them to the jail?

A Did I what?

Q Did you go with them to the jail?

1 A I did not.

2 Q Major, I would like to hand you one other picture

3 marked "State Exhibit 1". And I believe you see there eight

4 chairs or the backs of eight chairs, do you not, or seats?

5 A I believe that is correct.

6 Q Are they vacant?

7 A They are at present, looks like; yes.

8 Q They are on the inside of the bus station?

9 A Yes.

10 Q Major, did the police order everybody to leave the

11 bus station?

12 A I don't know.

13 Q Were there other people in the bus station when you

14 took these pictures?

15 A I did not hear any conversation.

16 Q Were there other people in the bus station when you

17 took those pictures?

18 A Yes.

19 Q There were?

20 A Yes, I think there were.

21 Q Major, did you order anybody to move back so you

22 could take the pictures?

23 A I did not.

24 Q So, these seats, then, were just vacant?

25 A Yes.

26 Q They were not vacant by any design or part of the

27 police. Is that correct?

28 A When the pictures were made they looked like they were

29 vacant; yes.

30 (Witness excused.)

D. M. MEECHAM

called as a witness on behalf of the State, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RICHARDSON:

Q Will you state your name and occupation?

A D. M. Meecham, of the Shreveport Police Department.

Q Mr. Meecham, how long have you been with the Shreveport Police Department?

A Almost ten years now, sir.

Q On the evening of August 3rd of this year and the early morning of August 4th of 1961, were you on duty?

A Yes, sir.

Q And what was your shift at that time?

A Eleven at night to seven in the morning.

Q And where did you first go on your shift; where were you?

A I was out at Queensboro district.

Q Is that primarily a residential area?

A Yes, sir.

Q What was the first contact or call or notification of any kind about your services being needed at the bus station on August 4th?

A Well, I got a call to return to the station at four-thirty in the morning. And the chief, night chief, dispatched us to the bus station.

Q Now, who would that be?

A That is Chief Giglio.

Q Who was your -- did you have a partner with you in the car?

A Guthrie; yes, sir.

Q Officer Guthrie?

A Yes, sir.

Q And you all had been in Queensboro?

A That is right.

Q Now, where did you go after you received that call at four-thirty in the morning?

A After he sent us to the bus station we went on down to the bus station and waited around in the bus station there, and they said they was expecting some kind of disturbance or something.

Q Now, that is not your regular beat, is it?

A No, sir.

Q It was not on that night your regular patrol beat, was it?

A No, sir.

Q And when you got to the bus station where were you assigned; where did you go?

A The west side of the bus station.

Q Is that the left-hand side as you face the front of the building?

A That would be the back on the Marshall Street side of the bus station.

Q On the back side away from Edwards Street. Is that right?

A That is right, sir; yes, sir.

Q But, if you were to stand at the front of the bus station or one front of the bus station on Fannin Street, it would be to the left. Is that right?

A Yes, sir.

1 Q Is that the place where buses quite often drive in and
2 unload passengers?
3 A That is where they drive in and unload.
4 Q Just tell us, please, what you did when yougot back
5 there.
6 A Well, we got back to the back of the bus station there,
7 and people come in, they would gang up around the door, get off
8 the bus.
9 Q Those were people getting off the bus?
10 A Getting off the buses.
11 Q What did you do insofar as they were concerned?
12 A And there was around eight or ten soldiers, a bunch
13 of people got off there, black and white, and ganged up around
14 the door and standing there. So, we asked them to move on.
15 Q Did they do that?
16 A They did.
17 Q Did you arrest any of those people?
18 A No, sir.
19 Q These were people that came off the bus?
20 A That is right. So, I went inside there. There was
21 some boys cutting up there on those marble machines.
22 MR. STONE: Just a minute, Mr. Meecham, please, sir.
23 If Your Honor please, we object to that. There isn't any
24 showing at all that the defendants were present at this time,
25 at the time that this was going on in the bus station that he
26 is about to tell about. So, we object to it, first, on the
27 basis of the fact that it is not relevant to the offense with
28 which these defendants are charged; and, further, that as to
29 them, it would constitute hearsay.
30 THE COURT: There has been no objection to hearsay

in the case at all, but I don't see any relevancy in what the boys were doing at the pinball machine.

MR. RICHARDSON: If the Court please, I would like to be heard on that if I may.

THE COURT: All right.

MR. RICHARDSON: This officer has testified that he was patrolling a regular unit out in Queensboro, and he was ordered and directed to go down to the bus station. There are certain things I want to show by this witness, to show that certain things transpired, and I think the State is entitled to show that he went down there under assignment and show that he went down there to keep the peace and when people moved on he didn't arrest them.

THE COURT: That is almost self evident, and I fail to see how it would be relevant to the prosecution. The objection is sustained.

BY MR. RICHARDSON:

Q After you went in there where the boys were, then, what did you do next?

A Well, the boys was playing --

Q (Interrupting) Never mind about the boys. The Court says we can't tell about the boys, I believe. So, after you did whatever you did --

A (Interrupting) I went back to the outside of the building, on the outside.

Q Then, what took place next?

A Then, there was three white, four black, come up to the door, and they stood around the door there for a few minutes. I asked them to move on, and I asked them to move on, and they moved inside.

1 MR. STONE: I didn't understand.

2 THE WITNESS: They went inside.

3 MR. STONE: Pardon me. I didn't quite understand.

4 Did you say move on or move inside?

5 THE WITNESS: I asked them to move on, move, disperse.

6 Well, there was the four went inside, two of them went around

7 the bus station the other way. When these four went in the bus

8 station people went to walking the seats, jumping over the seats,

9 where there were passengers that was there waiting on the buses.

10 And the four walked on over and stood in the middle of the floor,

11 people ganging up.

12 MR. STONE: Just a minute, please, sir. If Your

13 Honor please, I don't understand whether this witness is talking

14 about these defendants. If he is talking about the defendants,

15 of course, I think it is relevant. If he is talking about

16 somebody else, we object to it as being irrelevant.

17 THE COURT: Are you talking about the four defendants?

18 THE WITNESS: I am talking about the four blacks,

19 yes, sir.

20 MR. STONE: These four defendants?

21 THE WITNESS:: That is right. Walked on in the bus

22 station and people, just like I told you, was jumping up in the

23 seats, over the seats, walking the seats, and these four walked

24 on over to the middle of the floor, stood in a wad. And then

25 Chief Teasley come in there. I followed them on in. People

26 there, trying to get the people settled down and stop them from

27 running and jumping around in that bus station. So, Chief Teasley

28 taken over from there and talked to these four, at least, to one.

29 BY MR. RICHARDSON:

30 Q Mr. Meecham, when these four first came there, which

1 direction did they come from, insofar as you station on the
2 outside?
3 A Which way would Caddo Street be; north?
4 Q Came from the direction of Caddo Street?
5 A From Caddo Street side; they come up on the west side.
6 Q Then, they came from the direction of the north where
7 the alley is. Is that right?
8 A That is right; yes, sir.
9 Q Did you see yourself whether they arrived in a car or
10 on foot?
11 A They was in a car.
12 Q Did you see where the car went when they got out of
13 the car?
14 A They got out of the car and the car backed out and
15 went back through the alley and through the parking lot on the
16 west side.
17 Q Then, when they -- did you see them get out of the car?
18 A Yes, sir.
19 Q And when they came down, did they pass the interstate
20 waiting room?
21 A They passed it; yes, sir.
22 Q And, then, they came down where you were?
23 A Came on down where I was standing.
24 Q Now, when they came there what was the first thing
25 they said or did to you? I am talking about these four.
26 A They asked where the interstate passengers' waiting
27 room was. And I showed them where the waiting room was.
28 Q Is that the one they just walked past?
29 A That is the one they just walked past.
30 Q What did they say or do, or what did you say or do

1 to these four?

2 A They said they wanted to go in that interstate

3 passengers' waiting room, so I just stepped back out of the

4 way and let them go. They went on in.

5 Q Did they go in where Chief Teasley was?

6 A Went in where Chief Teasley was.

7 Q And that is in the intrastate waiting room?

8 A That is right; yes, sir.

9 Q And they had already passed up the interstate waiting

10 room?

11 A That is right.

12 Q Now, when they asked you on the outside, they asked

13 you where to go to get into the interstate waiting room?

14 A That is right.

15 Q And where did you show them it was?

16 A I showed them the interstate waiting room down there.

17 Q Now, what else was said by and between you and them

18 on the outside, if anything?

19 A That is all that was said between us.

20 Q Then, when they insisted on going on into the intra-

21 state waiting room you stepped aside. Is that right?

22 A That is right; yes, sir.

23 Q And they walked on in?

24 A Walked right on in.

25 Q What did you see that took place then?

26 A Well, that is whenever that they walked on in the

27 middle of the floor in there and stood there and people ganging

28 around them. That is when they was running across the seats,

29 jumping over the seats.

30 Q Who was doing that?

A Passengers waiting for buses in the bus terminal.

Q In other words, the passengers began to scatter. Is that what you mean, Mr. Meecham?

A Scatter and walking the seats and all.

Q Well, I didn't understand. You are not saying these people walked on the seats?

A No.

Q But, when they went in there everybody --

A (Interrupting) These four people here was standing in the middle of the floor. The passengers waiting for buses were the ones that was running and walking the seats.

Q Then, when these four people went in, that is when everybody began to break and run?

A That is right.

Q Did you have any contact or any notification of any kind about any kind of disturbance at the bus station that morning until you were called from your Queensboro beat at four-thirty?

A Not at all.

Q Did you know any of those four people?

A I didn't know either one of them. I don't remember ever seeing one of them.

Q Did you try to stop them from doing anything they wanted to do?

A I didn't try to stop them from going in the waiting room.

Q After they went in what did you next do?

A After they went in I followed them in there and, as I told you awhile ago, I was trying to get those people settled down there and assisting Chief Teasley in making his arrest.

1 Q Well, did you see where the other intrastate waiting
2 passengers, where they went? Did they go on the outside or
3 a restaurant or sidewalk or where?
4 A The ones that was up?
5 Q The ones that were already in there before these four
6 came in.
7 A They just ganged up in a big wad running through,
8 after they were running through the room trying to see, look
9 over people's heads, pushing and shoving.
10 Q And, then, what did you do next?
11 A Well, whenever the chief talked to them and asked them
12 to move on, asked them to not gang up, why, these four insisted
13 on staying. They wouldn't move. Everybody else went on and
14 sat down. Some of them sat down; some walked outside to the buses.
15 Q Mr. Meecham, did you yourself ask anybody, any of the
16 white people, to move on?
17 A I sure did.
18 Q And why did you do that?
19 A Well, they were ganging up. People gang up around
20 there and get --
21 Q (Interrupting) Then, while Chief Teasley was talking
22 to these people about moving on, you were moving the white
23 people on. Is that right?
24 A That is right; yes, sir.
25 Q Why did you do that?
26 A Well, they was up disturbing the passengers, running
27 around there. I didn't want anybody to get hurt, or anything
28 like that.
29 Q Well, now, you had no connection with what Chief Teasley
30 told them inside the station. Is that correct?

1 A Have connections with what he told them?

2 Q That is right.

3 A No; just listening to what he told them.

4 Q Now, then, while you were busying yourself moving

5 the white passengers around, did they all move on when you told

6 them to?

7 A They everone moved on, moved and sat down.

8 Q Did you have any difficulty with the white passengers

9 while these people were here in getting them to move on and be

10 quiet?

11 A No, sir.

12 Q Keep the peace?

13 A None at all.

14 Q When you tried to quiet them down and keep the peace,

15 did some of them move out of the lobby and the waiting room?

16 A Some of them walked outside to the bus, because they

17 was calling out the bus, I believe, the east-bound bus. I don't

18 remember just which bus they was calling out, but, anyway, they

19 was calling. Some of them walked outside to the bus, which

20 would be on the northeast side of the bus station.

21 Q Did any of the white people that you asked to move

22 on fail to move on?

23 A None of them.

24 MR. RICHARDSON: The witness is tendered.

25 THE COURT: We will recess until one-thirty.

26 (Whereupon, at 1:05 p. m. court was recessed until

27 1:30 p. m. of the same day.)

28

29

30

AFTERNOON SESSION

AUGUST 18, 1961

1:30 O'CLOCK P. M.

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D. M. MEECHAM

resumed the stand as a witness on behalf of the State, having been previously duly sworn, testified further as follows:

CROSS EXAMINATION

BY MR. STONE:

Q Mr.Meecham, you were, I believe, you said, stationed at the door of the waiting room at the bus station. Is that right?

A Well, that was on the west side of the bus station. I was near both doors, the cafe and the waiting room both.

Q What were your orders, Mr. Meecham, please?

A Keep down any disturbance.

Q I believe you testified on direct examination that you had on occasions ordered people to leave the bus station.

Q Not to leave, just to disperse, either sit down or move on.

Q Were those persons that you ordered to move on or to disperse permitted to go into the bus station if they wanted to?

A Well, anybody is permitted to go in the bus station that wants to.

Q You did not prohibit anyone from going into the bus station, did you?

A That is right.

Q When these people, these four defendants came up to the bus station you did not prevent them from moving into the bus station, did you?

1 A No.

2 Q Did you at any time order anyone out of the bus sta-

3 tion?

4 A Not out.

5 Q You ordered no one out of the bus station?

6 A Nobody out.

7 Q At all from the time that you got there until the

8 time that you left?

9 A I didn't order them out of the bus station.

10 Q When these people went into the waiting room, did

11 they go in the white waiting room or the colored waiting room?

12 A Which people are you talking about now, the defendants?

13 Q These four defendants.

14 A They went in one of the intrastate passengers waiting

15 rooms andstood up in the middle of the floor.

16 Q In one of the interstate passenger rooms or the intra-

17 state?

18 A Intrastate passengers.

19 Q Is that the white waiting room or the colored waiting

20 room?

21 A It is just one of the intrastate passengers.

22 Q Do white and colored use both waiting rooms?

23 A Well, I don't think they do.

24 Q Have you ever seen it, Mr. Meecham?

25 A No.

26 Q Seen colored people and white people using both

27 waiting rooms?

28 A Nothing only these four right here.

29 Q Would you have arrested any white people who came

30 in the waiting room in the white waiting room in the same manner

1 that these defendants did?

2 A If they were disturbing the peace or causing any dis-

3 turbance we moved them on and if they didn't move, then, we

4 put them under arrest.

5 Q When they came in the waiting room were they orderly

6 themselves?

7 A Walked in the bus terminal there, and they didn't make

8 any motions until they got in the bus terminal. They stood in

9 the middle of the floor. That is what --

10 Q (Interrupting) Were they not met in the middle of

11 the floor by Chief Teasley?

12 A They stood in the middle of the floor and Chief

13 Teasley walked over to them.

14 Q Were they saying anything to anyone when they walked

15 in the bus station standing in the middle of the floor?

16 A They wasn't. They was talking among themselves.

17 Q And Chief Teasley walked up, and you were able to hear

18 whatever the Chief said?

19 A That was whenever that the people went to running the

20 seats and stuff. The Chief then walked up.

21 Q People started jumping up in their seats and that sort

22 of thing?

23 A Walking the seats, jumping over them, standing up in

24 them, looking over the crowd's shoulders.

25 Q What officers dispersed these people?

26 A I was one of them. Officer Guthrie was in it. Officer

27 Dent, Officer Francis Head assisted me in getting those people

28 straightened out and getting them sit down.

29 Q Did you put any of them out of the bus station?

30 A We didn't put any out.

1 Q Did you arrest any of them?

2 A We didn't arrest any of them, but these four.

3 Q Did you arrest any of these people that were jumping

4 all up in these seats and creating a disturbance over there?

5 A No. We asked those people to sit down and they sat

6 down. Some of them got up and went out to their bus, but every-

7 one we asked to sit down, they sat down.

8 Q And what did the chief ask these defendants to do?

9 A To move on.

10 Q To move on?

11 A Yes.

12 Q Did they say that, "We are trying now to move over

13 here to the ticket window"?

14 A No, they didn't say that. They stood in the middle

15 of the floor, and the chief asked them to disperse, and that they

16 were causing a disturbance.

17 Q Isn't it a fact, Mr. Meecham, that when the chief

18 of police asked them to move on, that this young lady in the

19 yellow dress here, moved in the direction of the ticket window,

20 and somebody caught her and physically restrained her from going

21 in that direction?

22 A They did not.

23 Q Isn't it a fact that the chief of police told these

24 people to go around to the colored side?

25 A He asked them to disperse. He didn't say nothing about

26 white or colored waiting room.

27 Q Did he say go around to the other side?

28 A No. He asked them to move on, that they was causing

29 a disturbance.

30 Q I would like for you to consider this answer very

1 carefully, and take into consideration that there were others
2 present who heard the chief of police talk to these people.
3 I want to ask you can you swear on your oath that the chief
4 of police did not tell these people to go around to the other
5 side?
6 A The chief didn't tell those people to go around to the
7 other side. He asked those people to move, disperse.
8 Q Did anyone tell these people to go around to the other
9 side?
10 A Not that I heard.
11 Q Did anyone ask them -- pardon me, sir. Go right
12 ahead.
13 A I was right there and didn't anybody tell them to go
14 to a colored waiting room or get out and go around to the
15 other side or nothing like that.
16 Q But, you were quieting these people down, I believe
17 you also said.
18 A I was trying to quiet these people down.
19 Q But, you don't know what happened after that?
20 A The chief met those after we got these sit down.
21 Q When were all these pictures taken?
22 A When they were standing in the floor.
23 Q Weren't there some pictures made when they first
24 came in?
25 A I believe there were some pictures made as these four
26 were going into the door of the waiting room. I believe they
27 made some inside.
28 Q I believe you posed for some of these pictures, didn't
29 you, Mr. Meecham?
30 A I don't pose for no picture.

1 Q You were in some of them, weren't you?

2 A I might have been in on a picture, but I don't pose

3 for no picture, not in police work.

4 Q Mr. Meecham, you say that people started running and

5 jumping up and first one thing and another when these people

6 got down there.

7 A Standing in the seats. That is right.

8 Q The fact about it, Major Coles Thomas looked up and

9 saw them and immediately rushed into the bus station, didn't he?

10 A He was in with the chief, I believe, on that.

11 Q Beg your pardon?

12 A I believe he was in with the chief himself on that.

13 Q You don't know who came through the door immediately

14 ahead of these people?

15 A Major Thomas was in the bus station. I don't know

16 which door he come in.

17 Q And among those that crowded around were police

18 officers, weren't they, or sheriff's officers?

19 A It was what, now?

20 Q You said people started crowding around these people

21 when they got in the bus station.

22 A There was around twenty-five to thirty-five people

23 sitting in the seats in there, I would say, and they were waiting

24 on their buses, and they were the ones that started pushing and

25 shoving and up on the seats.

26 Q About how many police officers were in there?

27 A There was around seven or eight of us.

28 Q Seven or eight?

29 A In the bus station at that time.

30 Q In the station at that time. These people who jumped

1 up in the seats, and so forth, were they white people or colored
2 people?
3 A They were white, and they had the porters. The porters
4 were standing up on the seats, even one was up on the steps going
5 to the rest rooms.
6 Q How long did it take you to get these people quieted
7 down?
8 A Oh, three or four minutes; something like that.
9 Q How long after these people went into the bus station
10 was it before they were carried out under arrest?
11 A Well, for the exact time, when we got these people
12 all quieted down and they sat down, the chief of police, Chief
13 Teasley talked to these four and asked them to disperse, move
14 out, and they refused any of his orders. And I would say it was
15 from five till ten minutes from the time he was talking to them
16 until --
17 Q (Interrupting) You say "refused his orders". How
18 many orders did he give?
19 A He asked them to move, disperse.
20 Q Did he ever say anything to them about the state law?
21 A He didn't say anything about a state law.
22 Q The chief didn't say anything at all to them about a
23 state law?
24 A Not that I heard.
25 Q Did you say that you heard all that the chief told
26 these people?
27 A I didn't hear every word; no.
28 Q You would not testify, then, on your oath, that the
29 chief did not tell these people to go around to the other side,
30 would you?

A He didn't tell them that.

Q In your presence?

A In my presence, he didn't tell them.

Q But, he could have told them outside of your presence?

A I don't know that.

Q Did these people, these defendants, these four defendants themselves, create any disturbance in the middle of the floor?

A Well, they got the people up out of their seats.

Q Did they say anything to the people?

A They didn't say nothing to them people.

Q Why did the people get up? Do you know?

A I don't know.

Q But, they got up when they came in. Is that right?

A Whenever they were standing in the middle of the floor, people got up there and whenever we walked over to them, well, the chief was walking over in the middle of the floor. The people got up and went to running the seats, jumping over the seats, standing in the seats, pushing, trying to get up to the front to see who was up there.

Q Were these defendants free to take seats in the waiting room if they wanted to?

A There was plenty of vacant seats.

Q Could they have sat down if they had wanted to?

A There was vacant seats if they wanted to.

Q The police would not have interfered with their taking seats in the waiting room. Is that right?

A Not as long as people don't disturb others and cause a disturbance.

Q Well, what I am driving at, I am talking about these

1 defendants, Mr. Meecham. I want to know if these -- you said
2 that these defendants came in and that they were only talking
3 among themselves. You said that they said absolutely nothing
4 to the other people in the waiting room at that time until they
5 talked, of course, to Chief Teasley. But, you said that the
6 other people jumped all up in the waiting room and stood in
7 chairs and that sort of thing. You have testified that you
8 did not arrest any of them. You have also testified that you
9 asked them to move on and that they took their seats. And I am
10 asking you could these defendants -- were these defendants also
11 free to take seats in that waiting room?
12 A I wasn't stopping them from sitting down.
13 Q You would not have stopped them?
14 A I wasn't stopping them from sitting down, nobody.
15 Q So, when the chief said move on, if they had wanted
16 to they were perfectly free to sit down and not cause themselves
17 to be arrested?
18 A They refused to move. They refused to get out of a
19 crowd. There was four of them together, and they refused to
20 move out of the middle of the floor.
21 Q And this order from the chief, the effect of it was
22 to move out of the middle of the floor. Is that what you are
23 telling me?
24 A Get out of the middle of the floor, that they were
25 disturbing the peace.
26 Q Mr. Meecham, I hand you "State Exhibit 1". It is
27 a photograph. Would youlook at it, please? Do you recognize
28 yourself in that photograph?
29 A Yes.
30 Q Do you remember that incident, that scene?

A That is right. That is after we got the people set down.

Q I believe you testified that nothing was really said to these people by the chief until after they sat down. Isn't that right?

A Got the people quieted down and the chief --

Q (Interrupting) Walked over?

A Walked over to them and asked them to move out.

Q Was that picture taken at that time?

A This picture was taken here after we got the people set down.

Q At the time do you recall what the chief said to them at that time, if anything?

A You mean after the chief walked over to them?

Q At the time that this photograph was taken, what was the chief talking to them about? Do you recall?

A The chief was asking them to disperse, move out of a crowd.

Q Can you see any way that they could have moved out in that photograph?

A They could have moved out either way.

Q About how many people do you see in that photograph, Mr. Meecham?

A Well, there is about fourteen.

Q All but five are police officers, aren't they, or sheriff's officers?

A No, I don't think so.

Q At any rate, those people are blocking everything except the exit through the door, aren't they?

A No. Between these seats right here and where me and

1 this officer was standing there was five or six feet, a dis-
2 tance that they could have walked right through there. They
3 could have walked out through here or they could have walked
4 around this way.
5 Q Where in relation to that, to you, Mr. Meecham, is the
6 ticket desk?
7 A It is over this way.
8 Q Did anybody say anything to these defendants about
9 where they were going or asked them if they had tickets or
10 anything of that sort?
11 A Nobody that I heard. There wasn't no tickets that
12 I heard anybody say anything about.
13 Q Do you recall the conversation that you had outside of
14 the door with Harold Bethune and these other defendants?
15 A I didn't have any conversation outside of the door
16 with them.
17 Q You didn't say anything to them on the outside?
18 A No.
19 Q But, you must have. You said you told them something
20 about --
21 A (Interrupting) They asked -- they did ask where
22 there was a waiting room, and I pointed it out to them.
23 Q You didn't tell them, Mr. Meecham, that if they went
24 in the white waiting room they were going to be arrested?
25 A No. That was in the paper, but I didn't say that.
26 Q That is just what the paper said you said?
27 A That is the paper.
28 Q How long were these defendants inside the bus station
29 before the chief of police walked over to where they were and
30 started talking to them?

A Approximately four minutes; something like that.

Q Mr. Meecham, have you not seen on numerous occasions -- I believe you say you have worked on occasions that beat near the bus station over there.

A Yes. I used to have that beat down there.

Q Have you seen three or four people standing in the floor talking in the bus station before?

A That is right, go up and ask them to move. They have been standing out in the front of the place. I go up there and move them from there.

Q Move them from out of the middle of the floor?

A A gang. See, anywhere anything more than two people I consider as trouble brewing.

Q You consider it a gang and you would order them to move?

A Order them to disperse, take their seats.

Q What about four people sitting together, Mr. Meecham, as we are sitting together here?

A If they are sitting in the bus station or sitting in any place at all like that, that is not disturbing the peace, because they are sitting in an orderly manner. They are causing no disturbance.

Q Would you consider us disturbing the peace now, standing as we are?

A I wouldn't say you were disturbing the peace standing. You are not causing any excitement.

Q Were they standing in the manner that we are standing now in the bus station, grouped together talking?

A Standing facing each other, and, naturally, people go to get up and looking up and running, wanting to see when

1 people gang up, you know. You have seen that on the streets,
2 or anywhere else. It don't make any difference. If something
3 or other happened, like take, for instance, a person go out
4 there and just lay down in the street or on the sidewalk, I
5 will give you five minutes and there will be a hundred people
6 around trying to see what is in the middle.
7 Q Mr. Meecham, isn't it a fact that the only disturbance
8 that was created over at the bus station was created by those
9 people jumping up in those chairs and jumping over those seats
10 and that you arrested none of those people?
11 A Those people sat down and moved on when I told them to.
12 Q But, they were the ones who created the disturbance,
13 weren't they?
14 A These people here was the ones that created the dis-
15 turbance.
16 Q By coming in the bus station?
17 A By coming and standing in the middle of the floor, and
18 people ganging around them.
19 MR. STONE: We tender the witness.
20 REDIRECT EXAMINATION
21 BY MR. RICHARDSON:
22 Q Mr. Meecham, defense counsel has just asked you, or
23 made a demonstration about situations in which you would or you
24 have ordered people to disperse and move on. I want you to
25 explain situations where you have ordered people to disperse
26 and move on.
27 A Well, now, there is different places, and different
28 things, different occasions. Like, now, on Texas and Edwards
29 that Subway Cafe, that people get up there and sit and gang up
30 on that rail, which is leading down in there, the banisters.

1 Q That is by the Subway Cafe nextdoor to Nathans. Is
2 that right?
3 A That is right. Gang up.
4 Q Have you dispersed those people?
5 A I have moved those people along.
6 Q Have those always been white people?
7 A That is right.
8 Q No colored people over there. Is that right?
9 A No.
10 Q Have they obeyed your order and gone on?
11 A They go on.
12 Q Have you ever had to arrest them there?
13 A I have never arrested -- had to arrest them there.
14 And on the bank corner, they will sit on that ledge there.
15 I will ask them to move on and they will say, "Yes, sir," and
16 get up and move on, white and colored. And over at Walgreen's,
17 I have had a man to come across the street and he asked me to
18 come over there and move them, paople laying up against those
19 glasses, big glasses, gang up over there. People couldn't get
20 down the street without walking out around them and walking
21 in the edge of the street.
22 Q Well, now, when you have asked those people to dis-
23 perse and move on, have they done it?
24 A They moved right on.
25 Q Is that at H. L. Green's Store?
26 A That is H. L. Green's on Texas and Edwards.
27 Q Now, what about when you have been out patrolling in
28 a car?
29 A Out to the Highway Cafe.
30 Q Where is that?
A That is out in the 3200 block of Greenwood Road.

1 Q Is that a white area?

2 A That is all white. They get out there sitting on cars,
3 and walking around there, loud talking and stuff, and scuffling
4 and cutting up, and get out there and disperse them, move them
5 on. And they move on without any trouble.

6 Q Did you ever have to arrest any of them?

7 A None of them.

8 Q They just moved on?

9 A And over to the Fair Grounds one night I got a
10 call over there that there was a gang fight, which I went over
11 there. People was ganged up around the entrance over there to
12 the Youth Center. And I asked them to move. I got this call
13 from the night watchman out there at the United Gas Building.
14 I asked those people to move and get on out of the way. They
15 took right on off and went on.

16 Q Did you have to arrest any of those?

17 A I didn't have to arrest them, because they moved
18 when I told them to.

19 Q Well, now, with reference to this situation this
20 morning on August 4th at the bus station, did you treat these
21 people and the other people the same way as everybody else that
22 you have just described?

23 A It don't make any difference to me what color they
24 are; as long as they are violating the law or within the law,
25 they are treated just alike.

26 Q Well, now, if the people in the waiting room that
27 were white when you ordered them to move on, they did move on,
28 as you have testified?

29 A That is right. The porters at the bus station there,
30 they was up and I told them to move, and they moved.

1 Q Are they colored porters?

2 A That is right.

3 Q And they moved?

4 A They moved and went on about their work.

5 MR. RICHARDSON: The witness is retendered.

6 RECROSS EXAMINATION

7 BY MR. STONE:

8 Q Mr. Meecham, were any of these defendants in any of

9 those groups that you have talked about a minute ago that you

10 ordered to move on and that obeyed your order?

11 A Not that I remember. I don't remember any one of them

12 being in it.

13 Q I believe you testified a few minutes ago that you did

14 not order these defendants to do anything at the bus station,

15 did you?

16 A I didn't order them to do nothing.

17 (Witness excused.)

18 M. F. HEAD

19 called as a witness on behalf of the State, after being first

20 duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. RICHARDSON:

23 Q Please state your name and occupation.

24 A M. F. Head, Lieutenant of police, Shreveport, Louisiana.

25 Q Lieutenant Head, how long have you been with the

26 Shreveport police department?

27 A Thirteen years.

28 Q On the night of August 31st this year in the early

29 morning of August 4th of this year, were you on duty at that

30 time?

1 A Yes, sir.

2 Q Were you at headquarters at that time?

3 A Yes, I was.

4 Q Did you go to the bus station on this occasion of

5 this case?

6 A I did.

7 Q What was the first notice or knowledge or order or

8 any kind of notice you had that you were to go there?

9 A I heard Major Giglio on the air, on the radio, call

10 the operator and tell her to have Car 27 and 24 meet us at the

11 police station.

12 Q Where was Car 27 that night?

13 A He was riding all districts that night.

14 Q Where was Car 24?

15 A Stationed out in Queensboro area.

16 Q Is that a regular residential section?

17 A Yes, in the residential area.

18 Q And the first car, 27, is that the patrol wagon?

19 A That is the patrol wagon.

20 Q Who was operating the patrol wagon that night?

21 A F. T. Head.

22 Q Is that your brother?

23 A It is.

24 Q He is a patrolman?

25 A Yes, sir.

26 Q And the other car had how many officers in it?

27 A Two officers.

28 Q Is that a regular passenger patrol car?

29 A Yes, sir.

30 Q Not a patrol wagon, but a patrol car; that is a

1 patrol car?

2 A Yes, sir.

3 Q Did you go to the bus station then?

4 A Not -- I don't understand you.

5 Q Well, after you heard Chief Giglio or Major Giglio

6 call in those two units, what did you next do?

7 A I waited there until they came in. Major Giglio came

8 in at the same time.

9 Q All right. And what were your instructions; what

10 were you supposed to do?

11 A Get in the car with him and go to the bus station,

12 and send those officers down to the bus station.

13 Q Now, on that particular shift what were your hours?

14 A Eleven p. m. till seven a. m. the next morning.

15 Q From eleven p. m. on the 3rd till seven a. m. on the

16 4th?

17 A On the 4th.

18 Q And, other than this particular occasion, would you

19 have ordinarily remained at the police station at headquarters?

20 A Yes, sir.

21 Q Now, did you go to the bus station for any other

22 reason, other than on orders from Major Giglio?

23 A I went on his orders.

24 Q Now, when you got there what did you first do?

25 A I stood around outside and talked to Major Giglio for

26 a few minutes, and --

27 Q (Interrupting) Who had charge of assigning the

28 Shreveport police officers that came from the station?

29 A Major Giglio designated me where the officers were

30 to be assigned. I in turn told them where to go.

1 Q Well, where did you tell which officer to go?

2 A I told Officer Meecham and Guthrie to go to the back

3 door of the bus station, which is the west side of the bus

4 station.

5 Q Would that be the left-hand side as you face the

6 building from the street?

7 A Yes, sir, from Fannin Street.

8 Q Then, it is the back door, as distinguished from Edwards

9 Street. Is that correct?

10 A Yes, sir.

11 Q Meecham and Guthrie were to go to the west side of

12 the building?

13 A Yes, sir.

14 Q And who was the other men that were assigned?

15 A Officer Head was stationed at the east door on Edwards

16 Street. And I was at the east -- south door on Fannin Street

17 where I could stand at that door and watch the east door where

18 Officer Head was stationed. I could watch both doors there

19 then.

20 Q Now, then, you were stationed on Fannin Street which

21 a lot of people call the front of the building, because that

22 is a one-way, to look at the front of the building, the south

23 side?

24 A That is correct.

25 Q But, at the corner of the building where you also

26 could see Officer Head who was on the east side?

27 A Yes, sir.

28 Q The east side, is that the area where the buses load

29 and go on out?

30 A Normally load and go on out; yes, sir.

1 Q And, then, of course, Guthrie and Meecham on the west
2 side. Now, do you know Officer Dent?
3 A Yes, sir.
4 Q Did you see him that evening, that morning?
5 A Yes, sir. He was walking a downtown beat that morning.
6 Q He was a patrolman on foot?
7 A Yes, sir.
8 Q And did you assign him or did Mr. Giglio assign him?
9 A I think Major Giglio called him from across the street.
10 Head was making his rounds, came by the bus station, just walked
11 up Edwards to Fannin Street and Major Giglio saw him across the
12 street and called him over.
13 Q Now, while you were out there did Major Giglio go on
14 in the inside of the bus station? Did Major Giglio stay with
15 you or where did he go?
16 A No, sir. He went inside.
17 Q Now, while you were on the outside did you have occa-
18 sion to move anybody on?
19 A Yes, sir.
20 Q White person or colored person?
21 A White person.
22 Q One or more than one?
23 A One.
24 Q And when you told him to move on did he do that?
25 A He did.
26 Q Now, did you see any of the other police officers
27 from where you were? Did you see them move anybody on?
28 A I saw Officer Head up at the door pointing north under
29 the bus station where the buses load. Now, I couldn't tell
30 whether he was moving someone on or giving directions or what.

1 Q And, of course, you couldn't see the west side from
2 where you were. Is that correct?
3 A No, sir, I couldn't see the west side.
4 Q Now, what was the next thing that you saw or heard
5 with reference to this case, if anything, because I realize you
6 were out on the Fannin Street side?
7 A I didn't hear anything else said. I saw the officer
8 at the east door, Officer Head, and Officer Dent step inside
9 the station as they moved inside the station. I moved on up to
10 the east door and stopped there. After a few minutes there, look-
11 ing through the back door, I saw these people inside the station
12 moving toward the west door. I moved in behind them and walked
13 on out the west door.
14 Q Then, you actually didn't have any part, then, in what
15 went on inside the station?
16 A No, sir.
17 Q You just were assigned to the front and that is why
18 you stayed on Fannin Street?
19 A Yes, sir.
20 Q Now, after you saw Officer Head and Dent go from the
21 east side into the station, and you went up there, did you see
22 just roughly how many people were inside the station at that
23 time?
24 A Do you mean everyone that was in there?
25 Q I mean other than Officers.
26 A There was Chief Teasley.
27 Q No. I say besides the officers. Did you see other
28 passengers there in there?
29 A Oh, yes, sir. There were about eight or ten people
30 in there; maybe a dozen.
Q Eight to ten or a dozen?

1 A Yes, sir.

2 Q Besides the officers and you knew who the officers

3 were?

4 A Yes, sir. I didn't count them. I just knew the

5 people were around.

6 Q Were there people on the area where the buses load

7 up? Were there people out there?

8 A Mostly what I saw out there was the porters and the

9 bus drivers outside.

10 MR. RICHARDSON: The witness is tendered.

11 CROSS EXAMINATION

12 BY MR. STONE:

13 Q Lieutenant Head, did you hear any kind of noise com-

14 ing from the bus station while you were out there?

15 A Not at the position I was stationed at. I couldn't

16 hear anything.

17 Q After these defendants went into the bus station,

18 did you hear any noise then?

19 A I didn't see them go in the bus station.

20 Q You didn't see them when they went in?

21 A I didn't see them when they went in.

22 Q You have testified that you had asked people to move

23 on on several occasions?

24 A I said one occasion.

25 Q You asked one man?

26 A Yes.

27 Q For what reason?

28 A Because he came up there asking questions, that I

29 didn't feel was necessary to -- safe for people around him.

30 Q In other words, he had no business there?

A That is right.

Q If he had lawful business at the bus station you would have let him stay there?

A If he had lawful business there; yes.

Q What were your orders to your men, Lieutenant, that you deployed around the bus station?

A I don't quite follow you.

Q I believe you said you placed Mr. Meecham at one place and Mr. Guthrie at another. What did you tell them to do, other than to go around here to this door or wherever you sent them to?

A I told them to see that no disturbance broke out anywhere.

Q Did you tell them not to permit these -- any negroes that might show up to go in the white waiting room?

A I didn't tell them whether they could or could not let anyone in.

MR. STONE: That is all.

REDIRECT EXAMINATION

BY MR. RICHARDSON:

Q Did you arrive there before Chief Teasley arrived?

A Yes, sir, I did.

Q Did you see him come?

A Yes, sir.

Q Did you see Coles Thomas when he came?

A Yes, sir.

Q And Orval Richards?

A I don't remember seeing Major Richards.

Q Did you see Officers Burkhart and Palmer down there?

A I remember seeing them passing in a patrol car.

Q In a patrol car?

A Yes, sir.

Q They were just in the area patrolling. Is that correct?

A Yes, sir.

Q They didn't go into the bus station?

A No, sir. They are assigned to the downtown area and they did pass.

(Witness excused.)

JAMES A. DENT

called as a witness on behalf of the State, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RICHARDSON:

Q Please state your name and occupation.

A James A. Dent. And I am a patrolman for the City of Shreveport.

Q How long have you been in the Shreveport police department?

A Two years and six months.

Q What kind of work did you do before that?

A I was an office manager for Rockwell Manufacturing Company.

Q Mr. Dent, did you have occasion to be at the bus station here in Shreveport on the morning of August 4th of this year?

A I did.

Q Were you on regular duty that shift?

A Yes.

Q And what was your shift?

1 A Eleven to seven.

2 Q And what was your area that you were supposed to be

3 working?

4 A I was patrolling the area between Texas and Caddo

5 Street on a walking beat.

6 Q Does thatinclude the bus station area?

7 A Yes, it does.

8 Q How long have you been on that beat?

9 A Well, on that particular night we had had a number

10 of break-ins where people had thrown bricks.

11 MR. STONE: Wait just a minute. We object to that,

12 Your Honor, as being irrelevant and immaterial, and not respon-

13 sive to the question.

14 THE COURT: Sustained.

15 BY MR. RICHARDSON:

16 Q I just want to know how long had you been on that

17 beat down there.

18 A Just that night.

19 Q You had just started that night?

20 A Yes, sir.

21 Q And, then, it was a new assignment, but not connected

22 with the bus station?

23 A No, sir.

24 Q Now, what was your first notice or notification

25 that you were to go to the bus station to be there?

26 A Well, there was no notification. I was just walking

27 the beat, and I happened to go by the bus station and Chief

28 Giglio called me over and told me to stand by, and that they

29 had anticipated some kind of trouble.

30 Q Now, when he called you over there did you see what

1 city police officers were there?

2 A I saw at the time Lieutenant Head and Chief Giglio.

3 Q And they were whereabouts with reference to the bus

4 station?

5 A Chief Giglio was standing on the sidewalk on -- let's

6 see. It was the south side.

7 Q That is Fannin Street?

8 A Yes, sir.

9 Q And Lieutenant Head was with him?

10 A Yes, sir.

11 Q Do Chief Giglio and Lieutenant Head ordinarily come

12 over there to help you in your work?

13 A Yes, sir. He called me over and said, "Patrolman

14 Dent, stick around here and," he says, "stay by the east side

15 of the bus station." He says, "We anticipate some trouble."

16 And I didn't ask him what kind.

17 Q He didn't tell you what kind?

18 A No, sir.

19 Q And, the east side, is that the Edwards Street side?

20 A It is; yes, sir.

21 Q Is that the area where it has the large shed and the

22 buses come out from?

23 A Yes, sir.

24 Q Where did you go?

25 A Well, we were stationed on the east side, the intra-

26 state side, the east side of the bus station.

27 Q You were on the east side at the intrastate waiting

28 room?

29 A Yes, sir.

30 Q And who was there with you?

1 A Officer Head, Francis Head.

2 Q Now, at that time and place did you or Officer Head

3 in your presence move anybody on or have occasion to move any-

4 body on?

5 A I did, but there was a couple that he had talked to

6 and told them to move on.

7 Q Were they white people or colored people?

8 A There was one white soldier and one colored soldier, I

9 believe it was, if I recall correctly.

10 Q When he ordered them to move on did they move on?

11 A Yes, sir, they did.

12 Q Then, he did not arrest them?

13 A No, sir.

14 Q Did you have occasion to order anybody to move on at

15 that time?

16 A Well, once we had gotten inside the bus station we

17 had quite a disturbance created, and we asked some people to

18 sit down.

19 Q And did they do that?

20 A They sat down. Some of them sat down and some of them

21 moved on out of the bus station.

22 Q Were those that moved on out of the bus station in

23 obedience to your order -- did you arrest any of those people?

24 A No, sir, we did not.

25 Q Were they white or colored or both?

26 A They were white.

27 Q The ones that you ordered to move on, and they sat,

28 they moved on and sat down, were they white people?

29 A Yes, sir, white.

30 Q Did you arrest any of them?

A No, sir.

Q Then, everyone that you or Officer Head, who was with you at the time, asked to move, move on, did move on. Is that right?

A Yes, they obeyed our orders; yes, sir.

Q And you didn't arrest any of those folks?

A No, sir, we did not.

Q And I believe you said all but one of them were white people. Is that right?

A Yes, sir. And the one that he told to move on, we were on the east side of the bus station, we were outside the bus station.

Q In the work that you did there that morning, both on the outside and on the inside of the bus station, did you do it any differently than you ordinarily do in telling people to move on?

A No, sir. It is just in the ordinary line of duty.

Q Just regular procedure?

A Yes, sir.

Q And why were you doing that; why were you moving them on?

A To keep the peace, to keep from people crowding around and possibly getting into some kind of an argument.

Q When you got inside and you ordered people to move on as you have testified, and some moved on, and went on outside, and left, and some sat down, what did you next do?

A Well, I observed at the time when we went in the bus station that there were four colored people come in the bus station, and standing in the middle, and the other passengers inside the bus station had gotten up and was trying to crowd around and they were all pushing one another, and we asked them

1 to either sit down or leave the bus station, that they were
2 creating a disturbance, and they did. They obeyed our orders.
3 Q Now, that was people that were in the station, but
4 not these four colored people. Is that right?
5 A That is correct. They were in the bus station.
6 Q They were already in there?
7 A Yes, sir. They were in there, and after some had
8 sat down and some had left, we observed at the time that these
9 four colored people were being escorted outside, and we followed
10 them out, and put them in the paddy wagon.
11 Q Now, you had no part in their arrest. Is that cor-
12 rect?
13 A No, sir.
14 Q You were busy having other people sit down and keep
15 the peace?
16 A That is correct, sir.
17 MR. RICHARDSON: Witness tendered.
18 CROSS EXAMINATION
19 BY MR. STONE:
20 Q Officer Dent, I take it from your testimony -- and
21 correct me if I am wrong -- that you ordered people to move on
22 who were either creating some disturbance or who had no busi-
23 ness at the bus station. Is that right?
24 A That is correct. Oh, some had business at the bus
25 station because they were passengers.
26 Q Did you order them on, too?
27 A We ordered them either to sit down, if they were
28 passengers; if they were not passengers, to move on, to get
29 out of the bus station.
30 Q That is the order yougave -- "If you are passengers

1 sit down; if you are not passengers, move on"?

2 A Well --

3 Q (Interrupting) On out of the bus station. Is that

4 what you told them?

5 A We were primarily concerned with, regardless of

6 whether they were passengers or not, in keeping the peace, for

7 them not to crowd around those four people that had stood

8 around the middle of the -- come in the middle of the bus

9 station. We didn't know what was going on at the time, and

10 the rest of the people were crowding around, and we were trying

11 to keep them from getting in the group also, and possibly shov-

12 ing one another and getting in arguments, and possibly a fight,

13 which usually happens.

14 Q I believe you say that they were pushing one another

15 and all that, and that is why you ordered them to either sit

16 down or move on out of the bus station.

17 A That is correct, and they obeyed our orders.

18 Q In other words, they were doing something, weren't

19 they, something that was unlawful, pushing, and creating a

20 general disturbance?

21 A They weren't doing it to the extent that they were

22 pushing one another down or anything. They were maybe brushing

23 elbows or trying to see what was going on in a crowd.

24 Q Were these people brushing elbows?

25 A They were standing around the bus station and at the

26 time I didn't hear what was going on.

27 Q I mean these defendants.

28 A Those four defendants?

29 Q Those four defendants.

30 A Yes, sir.

1 Q Did you see them pushing one another?

2 A No, I didn't.

3 Q Did you see them brushing elbows?

4 A No. They were standing -- I didn't observe too much.

5 At the time I saw them they were just standing up, and then I

6 didn't pay too much attention to it, trying to get the other

7 people quiet.

8 Q Now, I take it from your testimony -- and this is what

9 you are inferring -- you are saying that some people in that

10 bus station were loud, and it was necessary for you to -- for

11 some officers to quiet them down; they were jumping all up?

12 A They were not loud. They were just moving, bustling

13 around, trying to see what was going on in the group.

14 Q Why was it necessary to quiet them down, if they

15 weren't loud, Officer?

16 A Well, that is our normal routine in our work.

17 Q Oh, they were --

18 A (Interrupting) We try to keep the peace. We try

19 to keep people from mingling and getting in arguments, which,

20 possibly, in a group it does happen.

21 Q Oh, these people, in other words, were restless. Is

22 that what you are saying?

23 A Well, they were restless, possibly, because of the

24 four.

25 Q Well, I am asking you if they were restless.

26 A I say they were restless, possibly, because of the

27 four.

28 Q I am not interested in why. I am just asking you

29 was it your impression that those people were restless.

30 A Yes.

1 Q And you tried to quiet them down?

2 A Yes.

3 Q All right. Now, you looked at these defendants.

4 They were standing there. Were they restless?

5 A They were just standing up. I didn't observe them

6 too much.

7 Q Rather casually, weren't they?

8 A Yes.

9 Q They weren't fixing to do anything to anybody were

10 they?

11 A I don't know what they were going to do.

12 Q They didn't look like they were, did they?

13 A I don't know what they were going to do.

14 Q What did you think they were going to do?

15 A I didn't know what they were going to do. I didn't

16 think what they were going to do. I was busy telling the other

17 people to sit down or either move on.

18 Q Officer, there is a statute that gives the police

19 officers great authority out there at a situation like this.

20 And you have told me that you acted under your authority as a

21 police officer to quiet this other crowd down. You didn't see

22 these people doing anything that made it necessary for you to try to

23 quiet them down, did you?

24 A Well, there were other officers around there at the

25 time.

26 Q But, did you see them doing anything that made it

27 necessary or you thought made it necessary for you to try to

28 quiet them down?

29 A Not at the time; no.

30 Q If there was something, this restlessness made you

quiet these people down because you thought a breach of the

1 peace was likely to result, you thought somebody was likely
2 to do something to somebody, didn't you?
3 A Well, either to somebody or either to theirself.
4 Q And you thought that they might do something to these
5 defendants, didn't you?
6 A Well, not --
7 Q (Interrupting) Or might try?
8 A Well, not at the time; no.
9 Q Did you think they might try?
10 A Well, it may be possible.
11 Q But, you didn't think these defendants were going to
12 try to do anything to them, did you?
13 A Well, I don't know what they had in their minds, what
14 they were going to do.
15 Q Not only what you thought at the time, Officer; you
16 were acting out there at that time all on your own?
17 MR. RICHARDSON: We object to what he thought these
18 people might have done at that particular instant. His hands
19 were full with the other people who he was trying to quiet. He
20 has stated he was there to keep the peace, and that is what he
21 was endeavoring to do. Other people were around.
22 THE COURT: Objection sustained.
23 MR. STONE: If Your Honor please, we will withdraw
24 the question.
25 (Witness excused.)
26 MELVIN G. GUTHRIE
27 called as a witness on behalf of the State, after being first
28 duly sworn, testified as follows:
29 DIRECT EXAMINATION
30 BY MR. RICHARDSON:

1 Q Please state your name, occupation?

2 A Melvin G. Guthrie, patrolman on the Shreveport

3 Police Department.

4 Q Mr. Guthrie, how long have you been with the Shreveport

5 Police Department?

6 A Just a little better than a year.

7 Q Mr. Guthrie, were you on duty on the night of August

8 3rd and the early morning of August 4th of this year?

9 A I was.

10 Q What was your shift; what were your hours?

11 A Eleven until seven.

12 Q And what officer were you with?

13 A Officer Meecham and I ride together.

14 Q Now, as between the two of you, which one is the

15 senior officer or lead officer?

16 A Officer Meecham.

17 Q And were you all in an automobile, a patrol car?

18 A Yes.

19 Q And where were you all on your work that night?

20 A Well, we was riding in Patrol Car 24, which patrols

21 Queensboro Section.

22 Q Is that a residential area?

23 A Yes, it is.

24 Q And what was the first knowledge or fist notice that

25 you had that you were to go to the bus station that morning?

26 A Well, we received a radio call, a 1027, which is

27 to return to headquarters, which we did.

28 Q And what did you do when yougot to headquarters?

29 A Well, the chief told us he wanted us to go up to the

30 bus station.

1 Q Now, Mr. Guthrie, you say the chief. Are you referring
2 to Chief Teasley or Chief Giglio?
3 A ChiefGiglio, the night chief.
4 Q Now, Mr. Giglio is assistant chief; is that correct?
5 A Yes, sir.
6 Q And what were your instructions; what were you to do
7 at the bus station?
8 A Just to keep down any trouble that might come up.
9 Q Just to keep the peace?
10 A Keep any disturbance that might come up or anything.
11 Q Now, when you got to the bus station did you ride in
12 the same patrol car?
13 A Yes.
14 Q And that is not a patrol wagon. That is a patrol
15 car. Is that right?
16 A It is a two-door automobile.
17 Q Now, when you got there where were you assigned?
18 A At the side of the bus station where the buses usually
19 come in and unload.
20 Q Is that the west side?
21 A The west side; yes.
22 Q Is it the left-hand side; if you were facing from
23 Fannin Street is it the left-hand side?
24 A Yes.
25 Q And tell me what you did when you got back there.
26 A Well, we just talked among ourselves, outside there.
27 Q You and Mr. Meecham?
28 A Meecham; yes.
29 Q And tell us what took place.
30 A Well, we -- like I say, we were just standing there

1 talking among ourselves, and that is all.

2 Q Did any buses come and unload while you were there?

3 A Yes. There was two or three came. A lot of people

4 got off.

5 Q Well, during the time you were back there did you

6 have occasion to move anybody on? You were sent there to keep

7 the peace and keep down any disturbance.

8 A Yes, sir.

9 Q How do you keep the peace and keep down a disturbance

10 when you don't know what is coming up?

11 A Well, if a group of people is bunching up or in a

12 particular place they shouldn't be, we don't know what might arise

13 out of it. You go ask them to move on or disperse.

14 Q Did you do that?

15 A Yes, on one of the buses that unloaded we did.

16 Q Were they white people or colored people or both?

17 A It was both.

18 Q And did they disperse and move on?

19 A Yes, they did.

20 Q Did they obey your orders?

21 A Yes.

22 Q Did you arrest any of those people?

23 A NO, sir.

24 Q Then, about how many times did that happen, if

25 any; more than one, before you saw these four people that are

26 on trial today?

27 A Well, I asked that group along with Officer Meecham.

28 And, then, I asked two or three other people by myself, just

29 up on that hill, if you can recall where the parking place is,

30 just drove up and get out of their cars and stand and look and

gaze. I asked them to go on if they didn't have any business in the bus station.

Q And did they do that?

A Yes, sir, they did.

Q Did you arrest any of them?

A No, sir.

Q Were they white or colored or both?

A They were white.

Q Now, that is on the slanted portion back there. Is that correct?

A It is up on the embankment of the parking lot up there.

Q Now, how long had you been there before you saw four of these people that are on trial today?

A Well, about thirty or thirty-five or forty minutes, I suppose; something like that.

Q And where were they when you first saw them?

A They were approaching the west side from the alley, from the back of the bus station, when I first saw them.

Q Were they on foot or in a car when you first saw them?

A When I first saw them they were walking. They were on foot.

Q What did they do; where did they go; and what did they say, and what did you say?

A Well, they just walked right on up to us.

Q Did they pass the interstate waiting room getting to where you all were?

A Yes. And they just came right on up to us, and asked where the interstate waiting room was.

Q Where the interstate waiting room was?

1 A Right.

2 Q Did you all show them where it was?

3 A Officer Meecham did.

4 Q And, then, what happened?

5 A Well, they just walked on the inside.

6 Q And did you stop them in any way?

7 A No, sir.

8 Q You didn't order them to move on or do anything?

9 A Yes, sir. We told them to move on, and then -- or

10 Officer Meecham did. I didn't.

11 Q Were you there?

12 A I was there. And they walked on the inside.

13 Q Now, when they walked inside, did they walk in the

14 intrastate waiting room?

15 A Yes.

16 Q Where Chief Teasley was?

17 A Yes.

18 Q Did you see Chief Teasley when they walked in?

19 A After they had entered I saw him.

20 Q Well, when they first came up and spoke of the

21 interstate waiting room, did you or Officer Meecham show them

22 where it was?

23 A Yes, sir, Officer Meecham did.

24 Q Had they just walked past it?

25 A Yes, sir. Walked on inside the door.

26 Q Then, did you take part any more in this particular

27 incident down there?

28 A Well, just -- I followed them on in after they entered.

29 Q After they went in the intrastate waiting room you

30 went in behind Officer Meecham. Is that right?

1 A Yes, sir.

2 Q Now, tell us what took place with reference to any-

3 body or everybody or whether you ordered anybody else in there

4 to move on.

5 A Well, after they entered, like I say, Officer Meecham

6 and I walked in behind them, and they walked inside about the

7 middle or somewhere, and were just standing there talking.

8 And the other people, passengers or people that was in the bus

9 station, they turned around to see what was going on, moved

10 around in their seats, and the people from the cafeteria

11 started walking in there. And we asked them to go on about their

12 business and sit down and go drink their coffee and just sit

13 down; nothing concerned them.

14 Q Did you ask some of the white people that came from

15 any of the area to move on?

16 A Yes, sir.

17 Q I am not talking about these people now.

18 A Yes. Some of the ladies that were sitting there

19 reading, they got up and started walking around, milling around

20 to see what was going on.

21 Q Just milling around? Did you order them to move on?

22 A We asked them to go back and be seated.

23 Q Did they do that?

24 A They did.

25 Q Did you arrest any of them?

26 A No, sir.

27 Q How about the people that came in from the cafe or

28 coffee shop?

29 A As they came to the door they got about where the

30 pinball machines are. If you have ever been there. We asked

them to go on back and get their coffee and they did.

1 Q You told them to move on and they did that?

2 A Asked them to go get their coffee and they did.

3 Q They moved away from that area and went back?

4 A Went back in the cafeteria.

5 Q Did you or Officer Meecham or any of the officers in

6 your presence order anybody else to move on, not talking about

7 these four?

8 A I didn't; just the people that I said, right there

9 in the bus station.

10 Q All right. Then, after you had seen the people back

11 in the cafe, and then the other people you had them seated; then,

12 what took place next?

13 A Well, by that time they were still standing there talk-

14 ing among themselves. By that time Chief Teasley approached

15 and asked them what they needed, what they could do for them.

16 Q Well, now, you didn't hear all of Teasley's --

17 MR. STONE: (Interrupting) Now, we object to that,

18 if Your Honor please.

19 BY MR. RICHARDSON:

20 Q Did you hear all of it?

21 A I didn't hear all that he said to them; no, sir.

22 Q And after he got through talking with them what

23 happened then?

24 A They left to go outside and we followed them.

25 Q Did you have anything to do with this case after that?

26 A We followed them on the outside and sawthem in the

27 paddy wagon and closed the door. And that is the extent of what

28 I did.

29 MR. RICHARDSON: Witness tendered.

30 CROSS EXAMINATION

BY MR. STONE:

Q Mr. Guthrie, you were pretty close to Officer Meecham all the time, weren't you?

A Well, pretty close most of the time.

Q These people walked up and asked about the waiting room, and what did you tell them?

A Officer Meecham told them where it was.

Q And they went right on in it?

A They went right on in past us.

Q And you walked right in behind them, you and Officer Meecham?

A That is true.

Q They walked in orderly?

A Yes, they were orderly as they walked in.

Q Why did you follow them in there, Mr. Guthrie?

A We wanted to see what was going on.

Q Because four people walked in the bus station?

A As they entered the bus station the people that were sitting in their seats, other people that were sitting in there, started to get up to see what was going on.

Q But, you were going in with them anyway, before anybody got up. You say you turned and followed them right on in the bus station.

A That is right.

Q Why did you do that?

A I wanted to see what was going on.

Q There wasn't anything going on, you say, until they walked in there. You saw four negroes walking into the white waiting room, didn't you?

A I saw them, yes.

1 Q And you wanted to go in there and see what it was
2 all about, didn't you?
3 A We walked in behind them.
4 Q To see what it was all about?
5 A To see what was goingto happen.
6 Q To see what was going to happen?
7 A Yes.
8 Q And, insofar as they were concerned, nothing hap-
9 pened; they just walked in there and stood up and started talk-
10 ing to one another, didn't they?
11 A Caused a disturbance.
12 Q But, they walked in and stood up and started talking
13 with one another, didn't they?
14 A They caused a disturbance among the other people.
15 Q Is that what they did?
16 A That is what I told you awhile ago.
17 Q Did they say anything to anybody else?
18 A Talking among themselves.
19 Q And, then, the other people got up and started milling
20 around, you say?
21 A Started staring to see what was going on.
22 Q What were your orders to those people?
23 A We asked them to go back and be seated.
24 Q Go back and be seated?
25 A Yes. And,
26 Q And they went back and they took their seats?
27 A That is right.
28 Q All right. Now, I believe the Chief of Police came
29 up and talked to these people.
30 A That is true.

1 Q And the Chief Giglio came up and talked with them.
2 The fact about it, about seventeen police officers and sheriff's
3 deputies came up and crowded around these people, and I believe
4 you were one of them, weren't you?
5 A I was there; yes.
6 Q You are in one of these pictures with all of these
7 officers around these people. All right. Now, you heard
8 what the chief said. What did the chief say to them?
9 A I didn't hear all that he did say.
10 Q What did you hear him say?
11 A I heard him say -- ask them to disperse; asked them
12 to leave the station.
13 Q Leave the station?
14 A Yes.
15 Q You asked the white people to go back and sit down,
16 and the chief asked these negroes to leave the station, didn't
17 he?
18 A Asked them to move on.
19 Q You heard him say -- you just said a minute ago you
20 heard him say leave the station, and that is what you heard,
21 isn't it?
22 A I heard him ask them to move on, disperse.
23 Q And leave the station?
24 MR. RICHARDSON: If the Court please, counsel is try-
25 ing to put words in the witness' mouth. He hasn't said anything
26 like that. He said, "Move on, move on." The record will show.
27 MR. STONE: If Your Honor please, I am not putting
28 words in his mouth. He said that the chief told them to leave
29 the station. I want to be sure that that is what the chief
30 said. I want him to tell me whether or not that is what the

1 chief said.

2 THE COURT: Did the chief say that?

3 THE WITNESS: I just couldn't say, Your Honor.

4 BY MR. STONE:

5 Q Did you hear the chief say anything about, "Go around

6 to the other side"?

7 A Like I say, what I heard him say, he asked them to

8 move on and disperse. That was just about the extent of what

9 I heard him say. I didn't hear his entire -- what he told

10 them, all that he told them.

11 Q Did you observe the chief's manner when he talked to

12 these people?

13 A I couldn't see him too closely. I saw him, yes, sir.

14 Q But, you were standing there, weren't you?

15 A I was standing there.

16 Q As a matter of fact, Mr. Guthrie, you knew that if

17 these people went around to the colored waiting room, that it

18 would be all right, didn't you, that they wouldn't be arrested,

19 didn't you?

20 A I don't know.

21 Q You knew as a matter of fact that if they stayed in

22 the white waiting room they were going to be arrested, didn't

23 you?

24 A I didn't know if they would be arrested or not. I

25 didn't arrest them.

26 Q But, you thought they would, didn't you?

27 A There were some more on a different occasion came

28 up. They weren't arrested. They came in the white waiting

29 room.

30 Q Were they ordered out?

1 A Yes, and they did so. They were asked to move on.

2 Q What did you see when you -- did you ever hear these

3 people say anything to the chief of police?

4 A I heard them talking. I couldn't say the exact words

5 what they -- I couldn't quote them verbatim what they said.

6 Q You understood the chief, but you didn't understand a

7 thing they said to the chief?

8 A I didn't understand all that he said.

9 Q Did you understand anything that these defendants

10 said to the chief?

11 A This one right here said he wanted to use the inter-

12 state waiting room.

13 Q The same thing he told you?

14 A Right.

15 Q You had permitted it, and the chief didn't.

16 A That is all --

17 MR. RICHARDSON: (Interrupting) You don't need to

18 answer, Mr. Guthrie, because he is testifying. He hasn't asked

19 you a question.

20 BY MR. STONE:

21 Q You had told them where it was, and they went on?

22 A I said Officer Meecham had told them where it was.

23 Q And they went on in?

24 A And they just went on in.

25 Q And when they got in there they told the chief that

26 is what they wanted to do. And what did the chief tell them?

27 A Asked them to move on, disperse, go on.

28 Q Did you see this young lady in the yellow dress here

29 attempt to move after the chief told her toward the ticket desk,

30 and did you see somebody catch her and pull her back and tell

her, "The other way"?

A I didn't see anybody lay a hand on any of them.

Q Did you see any of them -- did you hear anybody tell her, "Don't go this way. Go the other way." Pointing toward the door?

A I did not.

Q When these people got into -- walked into the bus station virtually -- how many police officers were already in the bus station?

A I don't know. I didn't count them.

Q There were quite a few, a dozen or more, though, wouldn't you say?

A I say I didn't count them. I don't know how many were there.

Q Was there more than two?

A Yes. Officer Meecham and I would make two.

Q More than three?

A Chief Teasley would make three.

Q More than four?

A Chief Giglio would make four.

Q More than five? Was Lieutenant Head there?

A He was -- went to the bus station. I don't know whether he was inside or not.

Q Lieutenant Tilley there?

A I have never met Lieutenant Tilley personally. I don't know him.

Q You don't know Mr. Tilley of the sheriff's office?

A I have heard his name. I don't know him.

Q Did you see any sheriff's officer in there?

A I saw some of the sheriff's officers at the bus

station.

Q Were they on the inside?

A The only one -- yes, I believe there were some in there. I don't know who they were.

Q Was Mr. Homer Bryant in there?

THE COURT: What is the object of this line of questioning? The State has already established that more than twelve police officers were inside the white waiting room.

MR. STONE: I want to know from this witness, if Your Honor please, if that is true.

THE COURT: Well, you may ask him if that is true.

BY MR. STONE:

Q The Court has just suggested that the State has already established that more than twelve police officers were on the inside of the waiting room. Do you know whether or not that is true?

A I say there was more than four. I don't know how many there were.

Q Did you see or hear anybody else talk to these defendants, other than the chief of police?

A I did not.

Q Did you see these people with tickets; did they offer to produce any tickets?

A I didn't see any. I don't know if they had tickets or not. I didn't question them. I didn't talk to them.

Q Were there any police officers in the colored side of the waiting room, at the bus station?

A Were there any in there?

Q Yes.

A I don't know. I wasn't in there.

Q Did you see any in there?

A I didn't see any in there.

MR. STONE: We tender the witness.

REDIRECT EXAMINATION

BY MR. RICHARDSON:

Q Mr. Guthrie, defense counsel asked you a question awhile ago and you stated that the colored people came in there once before and they were ordered to disperse and move on, and they did do so. And they were not arrested. Is that correct?

A That is correct.

MR. STONE: If Your Honor please, that is not his testimony. We object to it on the basis of the fact that it is leading and suggestive. The witness testified that colored people came in there once before and they were ordered to leave.

MR. RICHARDSON: That is exactly what I asked him.

MR. STONE: No, sir. You said "ordered to disperse".

MR. RICHARDSON: "Ordered to move on".

THE WITNESS: I did say order to disperse or move on, and they did so.

BY MR. RICHARDSON:

Q And they weremot arrested?

A They were not arrested.

MR. RICHARDSON: The witness is retendered.

(Witness excused.)

BILLY R. FLOWERS

called as a witness on behalf of the State, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RICHARDSON:

Q Please state your name and occupation.

1 A Billy R. Flowers, Deputy Sheriff, Caddo Parish.

2 Q Captain Flowers, how long have you been with the

3 Sheriff's Office in Caddo Parish?

4 A Ten years.

5 Q What sort of work did you do before that?

6 A I was with the State Police and the City Police.

7 Q For how long all together have you done police work?

8 A Fifteen years.

9 Q Captain Flowers, on the night of August 3rd and the

10 early morning hours of August 4th, were you on duty at the

11 sheriff's office?

12 A Yes, sir.

13 Q Were you in charge, generally, of the night shift of

14 the sheriff's deputies?

15 A Yes, sir.

16 Q And did you have occasion to go to the bus station

17 early in the morning on August 4th of this year?

18 A I did.

19 Q What was the first notification there might be some

20 difficulty or some reason for you to go to the bus station?

21 A Chief Goslin called me and advised me to go to the

22 bus station.

23 Q Now, were you in charge of assigning the men there?

24 A Yes, sir.

25 Q When you got down there, just tell us just briefly

26 where you assigned the deputy sheriffs?

27 A Well, I was in charge of the ones on the outside, the

28 deputies on the outside. And I assigned those.

29 Q Tell me which man you assigned to which place.

30 A Well, I assigned Deputy Slagle and Green to the -- it

1 would be the, I would say the west side, the west end of the
2 bus station.
3 Q Well, I realize the directions are not true east and
4 west, but would that be on the left-hand side as you face from
5 Fannin Street?
6 A Yes, sir.
7 Q Is that where the buses often unload?
8 A Yes, sir.
9 Q And that was deputies Slagle and Green?
10 A Yes, sir.
11 Q All right. Now, who was the next officer or officers
12 that you assigned?
13 A Lieutenant May was assigned to the area along in
14 front of the bus station.
15 Q On Fannin Street?
16 A Yes, sir.
17 Q The south side?
18 A The south side.
19 Q All right.
20 A And Deputies Jones and Lieutenant Truly was assigned
21 over on the Edwards Street side on the loading docks over there.
22 Q That is Lieutenant Truly and Deputy McCall? Is that
23 who you said?
24 A No; Deputy Jones.
25 Q Now, where was Deputy McCall?
26 A He was along the entrance of the bus station.
27 Q That is on the Fannin Street side?
28 A On the Fannin Street -- it would be the front end.
29 Q How about Deputy May?
30 A He was along Fannin Street along the front of the bus

station.

Q Now, you had charge just of the men on the outside of the bus station. Is that correct?

A Yes, sir.

Q Tell us, please, what you did when you first got there and what took place, with reference to this case.

A Well, when I first got there I arrived, the men arrived, well, I assigned those men to their post.

Q And what was the first that you saw any of those six people that are on trial today? Where were they when you first saw them?

A At the corner of McNeil -- no, it would be the corner of Louisiana and Fannin Street.

Q Now, Fannin Street, we have been saying, runs generally east and west. Is that right?

A Yes, sir.

Q Now, was it the next street, Marshall, or the second street up McNeil, or the third street up Louisiana that you first saw them?

A Well, it would be the next street up from the bus station. Let me get my directions right.

Q Whatever street that was, which way were they going?

A They were going what we would call north. It would be on Marshall Street.

Q On Marshall Street?

A Marshall.

Q Headed north?

A Yes, sir.

Q And, then, where did you see them next?

A They turned down the alley and came in behind the bus

station.

Q And how many people were there and were they on foot or in a car or how were they traveling?

A They were traveling in a car.

Q And how many people were in the car?

A Six.

Q Did you get the license number of the car?

A Yes, sir.

Q And where did the car go at the back of the bus station?

A It pulled around to the back at the loading dock where the buses unload, load and unload.

Q And did you see them get out?

A Yes, sir.

Q How many got out?

A Four.

Q Do you see those four people here today?

A Yes, sir.

Q And how about the other two; what did they do?

A They immediately drove off in the car.

Q Do you know who they are?

A Yes, sir.

Q Who are they?

A They are Blake and David Dennis.

Q And when they drove away did they drive through the loading dock on the Edwards Street side or down the alley, or how did they drive away?

A They drove on down the alley to Edwards Street, turned right, and came to Fannin Street and turned back right and went -- it would be west on Fannin Street.

Q And did you have them in view then when they made those turns you have just described?

A No, sir. Now, whenever they turned right behind the bus station I couldn't see them, but that is the way they would have had to go.

Q Then, did you see them when they turned right again on Fannin to come back around to the front of the bus station?

A Yes, sir.

Q And, then, after they proceeded west, how long was it after that that you saw them again?

A They proceeded west on Fannin Street and the next time I saw them they were on Travis Street.

Q How far is Travis Street from the front of the bus station on Fannin Street?

A One block.

Q And can you see them from the front of the bus station to where they were parked or stopped?

A Yes, sir. You couldn't see well enough to recognize who was in the car, but I recognized the automobile.

Q You recognized the car?

A Yes, sir.

Q Now, after they drove away and you saw them over there did you yourself ever go into the bus station?

A No, sir.

Q You stayed on the outside?

A Yes, sir.

MR. RICHARDSON: Witness tendered.

CROSS EXAMINATION

BY MR. STONE:

Q Captain Flowers, did you on the morning that this incident is alleged to have taken place, have occasion to say anything to any of these defendants?

A I did not.

Q Were you in the presence of any other officer or sheriffs officer who said anything to any of these defendants?

A I was not.

Q Briefly, then, what all you know about it is the fact that you saw -- that is, from your own personal observation at that time, that you saw Dennis and Blake drive down with these other four defendants in the car, let them out at the bus station, and leave, and park some block or so away. Is that right?

A That is true.

Q Is that the gist of your testimony; is that what you saw happen?

A I saw that happen; yes.

Q You didn't see these defendants when they were placed under arrest, did you?

A No. I wasn't in the bus station when that happened.

Q Did you see Blake and Dennis when they were placed under arrest on the street? They were arrested on the street down there, I believe. Is that right?

A I don't know where they were arrested, because I wasn't there.

(Witness excused.)

JOHN H. GREEN

called as a witness onbehalf of the State, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RICHARDSON:

Q Please state your name and occupation.

A John H. Green, Deputy Sheriff, Caddo Parish.

Q Mr. Green, on the morning of August 4th of this year

1 were you on duty with the sheriff's department?

2 A Yes, sir.

3 Q What was your shift that night or morning?

4 A I actually came to work at four o'clock, sir. They

5 called the house and told us to go directly to the bus station.

6 Q Was that the first notice that you had?

7 A Well, there was some talk at one o'clock that possibly

8 we would be called out. We were told to stand by.

9 Q Well, that was just an alert from your office to be

10 on call if something came up?

11 A Yes, sir.

12 Q You have had alerts like that before, I believe?

13 A Yes, sir.

14 Q But, insofar as your being required to go to the

15 bus station on the morning of August 4th, four o'clock in the

16 morning was the first you knew of it?

17 A Yes, sir. They had told us when they put us on alert

18 that there was supposed to be some freedom riders in, and that

19 he would call. And they called and woke us up.

20 Q Did you go straight to the bus station?

21 A Yes, sir.

22 Q And where were you stationed?

23 A I was stationed -- I was just south of the station.

24 Q Just south of the bus station?

25 A 300 block of Marshall there at the intersection.

26 Q Now, where would that be with reference to Fannin

27 and Edwards Street?

28 A Well, it would be right on the corner of the bus

29 station there.

30 Q On the bus station corner?

A Yes, sir.

Q Now, with reference to the bus station were you out on the front, which we call the front, the Fannin Street side?

A Yes, sir.

Q Or were you on the Edwards Street side?

A I was on the Fannin Street side, sir.

Q Did you see any of these people that morning?

A Yes, sir, I did, sir.

Q Tell us where you saw them and what they were doing and how they were going?

A Well, first of all, there was three of us standing there talking when this car came by. And one of the men there says, "Well, there goes Dennis." Well, when he did, well, we all turned and watched the car go on up and come down in the alley behind the bus station. And one of the officers that was with me, he went to the back of the station, tried to get the license number and see who all was in the car. And I went on down to the other corner, so that if they came on out around the bus station, well, I would see who was in it and get the license number of the car.

Q Now, did the car stop at the back of the bus station on the north side?

A Yes, sir.

Q And did you see how many people got out?

A Yes, sir, I did, sir.

Q How many were there?

A There was four.

Q And how many remained in the car?

A I believe there was two, sir. There may have been three.

Q But, you know there were at least two?

A Yes, sir.

Q And where did they go then after that?

A They went on down the alley from the bus station, turned to the right, and they came back in front of the bus station.

Q Did you see them?

A Yes, sir.

Q And do you know who was in the car then?

A No, sir, I don't, sir. I know that Dennis was in there, because he was real light skinned.

Q You recognized Dennis?

A Yes, sir.

Q Now, after it came around toward the front of the bus station was it then traveling west away from the downtown area?

A Yes, sir.

Q Did you see it any more after that, that car?

A No, sir.

Q You didn't see it any more?

A Yes, sir, I did, sir. I take that back. They went down and they parked on the next street down from the bus station, where just the car could be seen. And they sat there in the car and watched what was going on, sir.

Q Now, at the point where that car was, that you last saw it, could you see that car from the bus station yourself?

A Yes, sir.

Q Did you see it that morning?

A Yes, sir; could see it through the parking lot.

Q Were there many cars on that parking lot at that time of morning?

A Oh, I would say there was probably seven or eight or ten.

Q Did you have any difficulty in recognizing the car over there?

A No, sir.

Q You were not present when the officers went over there to arrest Dennis and Blake. Is that correct?

A No, sir.

MR. RICHARDSON: Witness tendered.

CROSS EXAMINATION

BY MR. STONE:

Q Mr. Green, what were your instructions?

A Just not to let any groups gather or congregate.

Q And where was your station?

A It was there on the corner of the 300 block of Marshall.

Q And three other officers were with you?

A Well, actually, there was one other officer that was with me, and then one that had just come up to talk to us when they drove up, or were driving up.

Q When they drove up what did you do?

A Or were driving by.

Q What did you do?

A We stood there and watched them come on around and come up the alley.

Q And then did you leave?

A And then when they came on up the alley and stopped and the group got out of the car and went on, I walked to the corner so that I could see the car when it came on around.

Q Were you present in the bus station when these defendants were placed under arrest?

A I was never in the bus station.

Q Were you present at any time when any police officer or sheriff's deputy talked with these defendants?

A Just standing outside, and their group was off to where I couldn't hear any conversation.

Q Is the same thing with reference to the arrest of Dennis Blake true; you weren't present actually?

A I wasn't present there at all. I was a long way from there.

(Witness excused.)

H. H. PITTMAN

called as a witness on behalf of the State, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RICHARDSON:

Q Please state your name and occupation.

A H. H. Pittman, deputy sheriff, Caddo Parish Sheriff's Department.

Q Lieutenant Pittman, how long have you been with the Sheriff's Department?

A A little over eight years.

Q And what work did you do before that?

A City policeman.

Q How long have you been in police work all told?

A Thirteen years, a little better.

Q Lieutenant Pittman, did you have occasion on August 4th of this year to be at the bus station in connection with this case?

A Yes, sir, I was.

Q And what time did you get down there, approximately?

A Approximately five o'clock.

Q And who directed you to go there?

A Captain Flowers called me at home.

1 Q Is he the man in charge of the night group?

2 A Yes, sir.

3 Q When you got down there where did you go or where were

4 you supposed to be?

5 A Inside the bus station.

6 Q Just tell us what went on; tell us what took place.

7 A I reported inside the bus station about five-fifteen

8 or thereabouts, walked outside and was walking toward the west

9 entrance where the buses drive in.

10 Q Let's go back. You say you reported in. Who was

11 inside, as far as the sheriff's office was concerned?

12 A Homer Bryant.

13 Q Now, Lieutenant Flowers was on the outside. Is that

14 correct?

15 A He was on the outside; yes, sir.

16 Q Now, when you got in and after you first reported in

17 to Captain Bryant or Major Bryant, then, you said you went over

18 to the west side?

19 A Yes, sir. We walked around awhile.

20 Q Tell us what you saw and observed over there, and

21 what took place.

22 A Walked outside of the bus station on the Fannin Street

23 side and was walking toward the west driveway, and I observed

24 the blue Oldsmobile going north on Marshall crossing Fannin Street.

25 And I knew the subject Dennis by sight. I observed him driving

26 the car. There were others in the car.

27 Q That is one of these men on trial today, now, David

28 JamesDennis. Is that right?

29 A Yes, sir.

30 Q And he was driving the car crossing Fannin on Marshall

1 Street?

2 A Right.

3 Q Then, where did you next see the car after that?

4 A I next saw the car in front of the Journal Building

5 or the Southwestern Electric Building on Travis Street parked

6 headed east.

7 Q Now, then, between the time that you first saw the

8 car driving on Marshall Street crossing Fannin until you next

9 saw it parked over there, how long a time was that? Was it after

10 these other four had been arrested?

11 A Yes, sir.

12 Q Now, then, how long was it after you saw Dennis driving

13 across Fannin Street; how long was it after that that you saw

14 any of the four that were arrested?

15 A Saw any of the four again?

16 Q Yes.

17 A I saw the four walking toward the bus station from

18 the rear of the bus station.

19 Q From the rear? Now, is that the alley side, or rear?

20 A Yes, sir.

21 Q Now, where did they come from?

22 A I didn't see that.

23 Q You didn't see how they arrived? They were going into

24 the bus station at that time; they came from the rear or alley

25 down along the west side?

26 A Yes, sir.

27 Q And just tell us what took place then from that time

28 forward.

29 A I went on in the bus station and got with Chief Teasley

30 and Homer Bryant and some other officers in there. And the

subjects came into the bus station. Chief Teasley and all of us walked over there, and then Chief Teasley stopped them.

Q Now, of that group, how many of these people were there? How many of the people who are on trial today inside the bus station?

A There were four there.

Q And how many were men and how many were women?

A Two men and two women.

Q Do you see them here today?

A I saw them inside the station.

Q Do you recognize them here today?

A Yes, sir.

Q Now, after they got into the middle of the bus station and Chief Teasley walked over, just tell us what took place, what you saw or heard as between any of these people, and Chief Teasley.

A Chief Teasley stopped the group and asked them where they were going. And the spokesman for the group said he was going to purchase some bus tickets. Chief Teasley said, "You get them over there." And he pointed. And next said, "We are going to check the bus schedule." And he again told them, "You can do that over there." And he pointed again. And there was some conversation that I did not hear until he finally put them under arrest and they all left.

Q Then, all of you left. Now, then, did you leave at the same time as the patrol wagon or did you remain behind?

A No, sir. I remained behind.

Q What did you next do after that?

A We next observed the car parked down on Travis Street headed east.

Q

Q All right. Could you see that from the bus station?

A Yes, sir.

Q All right.

A So, Major Bryant -- no, Major Thomas, Captain D'Artois and myself went around to see what the car was doing and found it parked partly in a parking space and partly in the street.

Q Now, who was in the car at that time?

A Dennis and Blake.

Q Now, is that the same car and the same David James Dennis that you had seen earlier going across toward the rear of the bus station on Marshall?

A It was.

Q Just tell us what took place there at that time.

A We asked them about the reason they were parked where they were, and Dennis replied he was seeing some friends off that he had taken to the bus station. And at that time I walked around behind the car and was getting the license number, and Captain D'Artois and Coles Thomas were talking to the men. When I come back around the side of the car they decided they would go get Chief Teasley and Captain D'Artois went around to the bus station and got Chief Teasley and brought him back, and the chief placed them under arrest.

Q Then, were they taken to the parish jail?

A They were taken to the parish jail.

Q And how did they arrive and who drove, and so forth?

A They drove their own car and Major Thomas and myself rode in the car with them.

Q Did either of the men ever get out of the car until you got to the parish jail?

A No, sir.

MR. RICHARDSON: The witness is tendered.

CROSS EXAMINATION

BY MR. STONE:

Q Lieutenant Pittman, I want to hand you some pictures, please, sir. There is one marked "State Exhibit 5", another "State Exhibit 7", "State Exhibit 4","State 2", and "State 1". I would ask you if you see yourself on that picture.

A I do.

Q You are standing in pretty close proximity to Chief Teasley. Is that correct? Pretty near him?

A Pretty near him.

Q Would you look at this one Do you see yourself there?

A I do.

Q Are you also standing pretty near Chief Teasley there?

A I am a little farther away in that picture.

Q But, you are nevertheless pretty close to him?

A Pretty close to him.

Q Would you look at the next one? I don't know whether I saw you on that one or not. Are you on that one? I don't believe I did. Would you look at the next one, please, sir? You aremot on "State Exhibit 4"? Oh, yes, you are, I believe. There you are right there in the back. Is that you?

A It could be. It is not a good picture.

Q Can you look at it a little closer, please, sir, and tell me whether or not it is?

A I believe it is.

Q In that picture you are almost at the chief's elbow, so to speak, aren't you?

A Pr_etty close to him.

1 Q Would you look at the next one, please, sir? Do you
2 see your picture on that photograph?
3 A I do.
4 Q Are you pretty near the chief there? That is, Chief
5 Teasley.
6 A Fairly close.
7 Q Would you look at the next one, please? Do you see
8 yourself in that photograph?
9 A Uh-huh.
10 Q You were pretty near the chief at that time, too,
11 weren't you?
12 A I believe that is the chief standing there. I can't
13 see him there.
14 Q These pictures -- were you aware the pictures were made
15 over there that night?
16 A I was aware that quite a few pictures were being taken.
17 Q Mr. Pittman, you have been a police officer for about
18 twelve or thirteen years.
19 A I didn't hear you.
20 Q You have been in police work for about thirteen years?
21 A About thirteen years.
22 Q Did I understand you to say that you rode in the car
23 with Blake and Dennis to the jail?
24 A That is right.
25 Q Were you there when their personal effects were checked
26 and when they were receipted for them?
27 A No, I wasn't there.
28 Q You were not there at that time? When the chief talked
29 to these -- met these defendants, when they started in the white
30 waiting room, they were going into the white waiting room over
there at the bus station?

A They were in front of the ticket --

Q (Interrupting) Is that the white waiting room?

A That is the intrastate waiting room.

Q Beg your pardon?

A It is the intrastate, or interstate, waiting room. I don't know what the sign says outside there.

Q But, you do know it is used primarily by white people?

A It is.

Q And the one on the other side is -- fact about it, both of them, the one on the side where the chief is, or was at that time, was used almost exclusively by white people, was it not?

A I would say it is.

Q And the other one on the other side was used almost exclusively by colored people?

A I would say it is.

Q Now, this alley that you mentioned from which these defendants came, there is a door from one or both of those waiting rooms that opens in the immediate direction or vicinity of that alley; isn't that true?

A It opens where?

Q The alley that runs -- I don't know the streets, that runs parallel with Caddo, I believe. It is behind the bus station. That is an alley back there, isn't it?

A That is right.

Q And there is a door that opens from on that end of the bus station, isn't there? Can't you get into the waiting rooms from that way? That is what I am driving at.

A Yes.

Q Now, Lieutenant, you have said that the chief pointed, said, "You can get them -- " When these people wanted to get,

1 said they wanted to get tickets, the chief pointed and said, "You
2 can get them over there"?
3 A That is right.
4 Q To what did he point?
5 A He pointed toward the ticket counter.
6 Q Toward the ticket counter?
7 A Yes.
8 Q Did they make any effort to go get their tickets?
9 A No.
10 Q How would they have had to get these tickets? Would
11 they have had to go back out the door in order to get to the
12 ticket counter to which he pointed?
13 A They could have just walked up to the ticket counter.
14 Q It was the ticket counter in the waiting room in which
15 they were in at that time?
16 A It was.
17 Q And they said they wanted to get information and he
18 again said, "You get it over there"?
19 A That is right.
20 Q And pointed again?
21 A That is right.
22 Q Then, why did the chief place them under arrest? Do
23 you know?
24 A You will have to ask the chief that.
25 Q In other words, you don't know?
26 A I can't tell you.
27 Q But, you do know that when they said they wanted to
28 get tickets that the chief pointed to a counter in the white
29 waiting room where they could have purchased tickets. Is that
30 correct?

1 A I say the chief pointed to the ticket counter.

2 Q I am asking you was the ticket counter to which he

3 pointed located in the white waiting room?

4 A It is located in the center of the bus station. It

5 opens into two waiting rooms.

6 Q Is it attended to by both white and colored -- they

7 are served at the same counter, served tickets at the same counter?

8 A I don't remember how the counter is built. Is is in

9 an L-shape over there.

10 Q But, you do know that they could have purchased tickets

11 and that the chief was permitting them to purchase tickets or

12 to get information without leaving the waiting room in which they

13 were standing at that particular time. Is that right?

14 A I am afraid I don't understand what you are talking

15 about there.

16 Q Well, I will just pass that question up at least for

17 the time being. Were these defendants orderly?

18 A What do you mean by orderly?

19 Q Well, were they quiet?

20 A They were talking among themselves.

21 Q Were they kicking up a lot of noise?

22 A They wasn't kicking up a lot of noise; no.

23 Q Were they courteous to police officers and to anybody

24 else who said anything to them?

25 A As far as I could tell they were.

26 Q Did they do anything to anybody or threaten to do

27 anything to anybody in your presence?

28 A I heard no threats.

29 Q In their manner were they beligerent, or would you

30 describe them as being mild mannered, or how would you describe

1 them?

2 A Well, I would think when the chief of police gives

3 you an order and you don't obey it, you would call that beligerent.

4 Q What was the order that the chief of police gave them?

5 A To leave.

6 Q Oh, you didn't tell us about that. When did the

7 chief of police give them an order to leave?

8 A He advised them to leave, that they were violating

9 the state and city laws for disturbing the peace.

10 Q Are those the words that he used?

11 A I wouldn't say they are the exact words; no.

12 Q But, it was the essence of what he said?

13 A That is right.

14 Q "You will have to leave, because you are violating the

15 city and the state law"?

16 A That is right.

17 Q Then, they really weren't free to go get the tickets,

18 were they?

19 A I don't know whether they were or not.

20 Q Did they say anything about when the chief told them

21 that, "You leave because you are violating the city and the

22 state law"? Did they say anything to him to the effect, I don't

23 mean in the same words, but to the effect that they had business

24 at the bus station, that they wanted to buy tickets, or catch

25 a bus or do anything like that?

26 A I already testified the first thing I heard them say

27 was they wanted to purchase tickets.

28 Q And what did they do or say when the chief told them,

29 "Leave because you are violating the state and city laws"?

30 A I don't know what they said then.

Q Did Chief Teasley say or give any indication that the defendants were violating city and state law because of their presence in the bus station?

A I didn't hear him say that.

Q You didn't hear him? He just said, in effect, "Leave, because you are violating city and state law"

A That is all I heard.

(Witness excused.)

HOMER C. BRYANT

called as a witness on behalf of the State, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RICHARDSON:

Q Please state your name and occupation.

A Homer C. Bryant, deputy sheriff, Caddo Parish Sheriff's Department.

Q Major Bryant, how long have you been with the Caddo Parish Sheriff's Department?

A Eleven years.

Q And what work did you do before that?

A State trooper.

Q How long have you been in police work?

A Fifteen years.

Q Major Bryant, did you have occasion to be at the Trailways Bus Station on August 4th of this year, in the early morning hours?

A Yes, sir, I was.

Q And what was the first notice or notification that you received that caused you to go to the bus station?

A I was called by radio. We had been notified earlier

1 to proceed to the bus station and try to be there around four-
2 thirty or four-forty-five. And while riding near the city, I
3 was radioed from my office and dispatched to go there immediately.
4 Q Then, you actually were due there at a later hour, but
5 while you were in your car you received a radio call to proceed
6 immediately?
7 A Yes, sir.
8 Q And when you got there what did you do?
9 A I went inside the bus station and walked around, and
10 then took a seat.
11 Q Were there passengers and people there?
12 A Yes, sir.
13 Q And were there people in the restaurant part?
14 A Yes, sir.
15 Q People in the employees'-- in the baggage part?
16 A Yes, sir.
17 Q Did you see people behind the ticket counter?
18 A Yes, sir.
19 Q Does the ticket counter open both into two different
20 rooms, two different waiting rooms?
21 A Yes, sir.
22 Q When a person is in the intrastate waiting room, are
23 they able to buy tickets at the ticket counter?
24 A Yes, sir.
25 Q When the persons are in the interstate waiting room,
26 back towards the north side, are they able to buy tickets at the
27 ticket counter?
28 A Yes, sir.
29 Q The same employees wait on both waiting rooms?
30 A Yes, sir.

1 Q Did you see the ticket counter man; were there employees
2 at the ticket counter that morning?
3 A Yes.
4 Q What state or parish officers were there, if any, when
5 you first arrived?
6 A There was two city officers there.
7 Q Who were they?
8 A Officer Meecham, and I can't recall the other officer's
9 name that was with him.
10 Q His partner?
11 A His partner, yes.
12 Q Were they inside or outside when you first arrived?
13 A They were outside the door.
14 Q Were there any city officers inside when you first
15 arrived?
16 A I didn't see any.
17 Q Were you the first state or parish officer whoarrived?
18 A Yes.
19 Q Tell us who else arrived inside the bus station where
20 you were, inside.
21 A Later, Chief Teasley, Captain D'Artois of our department,
22 Lieutenant Pittman, several city detectives, Major Thomas,
23 Major Richards.
24 Q All right. Now, after you saw those people arrive,
25 what was the next thing that you saw or observed?
26 A After the officers arrived, there was quite a few
27 there. I saw these people, the defendants --
28 Q (Interrupting) Well, now, you have named three parish
29 officers. You and D'Artois and Pittman, and three city officers.
30 That is Teasley, and then Thomas, and Orval Richards.

1 A Well, there were several more there. Chief Goslin was
2 there, certainly.
3 Q Now, then, what was the first thing that transpired
4 with reference to this occurrence inside the bus station?
5 A The defendants walked in.
6 Q How many?
7 A There were four.
8 Q All right.
9 A Led by the Reverend Bethune. They walked to a point
10 adjacent to the ticket counter. And Chief Teasley and myself,
11 Captain D'Artois, another officer or two approached them. Chief
12 Teasley told them to go to another part of the building there,
13 or words to that effect. And they said they wanted to buy
14 tickets. And he said, "You can get tickets over there." And
15 they said, "We want to get them over here." And, then, he said,
16 "We have got tickets." And he said, "We are going to catch the
17 bus. We want to wait for the bus here." And he asked them to
18 wait over there. And he said, "We will wait here. We would
19 rather wait here," or something to that effect, that an ICC
20 ruling was that they could wait in there, catch the bus from there.
21 Chief Teasley informed Reverend Bethune and the other group that
22 they were threatening to breach the peace. And I didn't catch all
23 the conversation that followed there, that followed by the Reverend
24 Bethune. There was someone talking right behind me, but I did
25 hear Chief Teasley place him under arrest after telling him that
26 some two or three times, that he was threatening to breach the
27 peace.
28 Q Then, after they were placed under arrest, what did you
29 next do?
30 A The next thing I did was to walk outside when they were

placed in custody. I got in my car and proceeded to the Caddo Parish jail.

Q Now, about what time of morning did you get to the jail, parish jail, just approximately?

A Around possibly five, four-forty-five or five o'clock.

Q Were you there when the other two defendants were brought to the jail?

A Yes, sir.

Q You had no part in their arrest. Is that correct?

A No, sir.

Q Did you interview any of these persons in the parish jail?

A Yes.

Q And who was present when you interviewed them?

A Captain D'Artois.

Q Any other peace officer besides you and Captain D'Artois?

A Not during the interview.

Q And when you talked with these people did they talk freely and voluntarily to you?

A Yes.

Q You didn't promise them or offer them anything, any reward or inducement to get them to say anything?

A No.

Q Did you threaten them in any way?

A No.

Q Did you or D'Artois or anybody else in your presence or to you knowledge ever do anything like that?

A Absolutely not.

Q Do you recall what your conversation was with Marie

McGinnie?

A Yes.

Q Just tell us what she said about this situation and about this particular case.

Q We asked how she come to join this group, and --

MR. STONE: (Interrupting) If Your Honor please, we object to her answer or object to the testimony by the deputy sheriff, Mr. Bryant, as to this particular question and her answer thereto, because there can be no legal relevancy between how she happened to join this group and whether or not she disturbed the peace at the bus station.

THE COURT: It might be relevant as to her intentions. If the answer has anything else to do with any other matter, the Court will disregard it. Go ahead.

BY MR. RICHARDSON:

Q Just go ahead, Major Bryant.

A Marie McGinnie said that she had attended a meeting some three or four days previous at the St. Mary's Baptist Church. There were ten or twelve people there, and among them were all of the defendants, with the exception of Blake.

Q Except Blake? All right. Go ahead.

A Except Blake. That plans were laid at that time to test our facilities, and if they succeeded and were not arrested, to proceed on to Jackson. She said that they decided to let Bethune do the talking.

MR. STONE: Let who do the talking?

THE WITNESS: Bethune. She told us that. And we asked her about various aspects of CORE organization. She told us, of course, that Dennis was the CORE leader here, and she said she had attended several meetings of this type, that she was

picked up that morning, the morning of her arrest, by Dennis and Reverend Bethune. Her and her sister were picked up and were transported back to Dennis' house. She stated that a little while later that they got in an automobile and were driven to the bus station by Dennis and Blake.

Q Did she state how long she had known Dennis or what her connection was with Dennis or the organization they were interested in?

A I don't recall her saying how long she knew him.

MR. STONE: Just a minute, Major, please, sir. If Your Honor please, we object to that as being irrelevant.

MR. RICHARDSON: If the Court please, it is all with reference to intent, for what they went down there, whether it was a bonafide bus trip, whether it was other reasons, whether it was going to be a breach of peace. I think it is all relevant to show the connection and the association, what their business was. The matter of intent has to be judged from all the facts and circumstances.

THE COURT: The question was how long one of the defendants had known another defendant and had been associated with some organization. I don't think that has any relevance to the issue in this case.

BY MR. RICHARDSON:

Q Now, did you state a moment ago that she went to the bus station in the car with Dennis and Blake? Is that correct?

A That is correct.

Q Now, did you and Captain D'Artois talk to David Dennis that morning?

A Yes, we did.

Q At that time and place did you or D'Artois or anybody else in your presence or to your knowledge say anything towards

1 David Dennis by way of threats or promises or inducements
2 to get him to make a statement about this case?
3 A No.
4 Q Did he talk about it?
5 A Yes.
6 Q Tell us what he had to say about this case and this
7 incident.
8 A He said he was the CORE representative here. We dwelt
9 on that awhile, about thirty members, he said in his group here;
10 that he the previous day to their arrest had contacted Blake at
11 his home, that he had asked him to ride with him to carry the
12 riders to the bus station and/asked why he contacted Blake. He
13 said he always respected his judgment. He, of course, said that
14 he had attended some meetings where plans had been laid, and he
15 said that he was up all night the night prior to the arrest,
16 Friday. And about four o'clock he called Blake and asked him
17 to come over to go with him to carry the riders to the bus station.
18 He also said that prior to Blake's arrival that he and Bethune
19 or, rather, he and Bethune picked up Deloris and Marie McGinnie,
20 and I believe Levert Taylor came with Bethune earlier. Bethune
21 picked up Levert Taylor and brought him to Blake's house and
22 then the three of them picked up the two girls, as I understood
23 it.
24 Q Did he say anything about with reference to when he
25 had bought the tickets for this particular occasion?
26 A He said he bought two tickets on Wednesday. He returned
27 and bought three tickets on Thursday.
28 Q He said that he had bought five tickets?
29 A Yes, sir.
30 Q Did he say anything else with reference to this incident

1 or the planning of it or about the trip or about anything that
2 might come about?
3 A He said they had had some meetings making plans to
4 test facilites. And his plan was to test facilities here and
5 go on to Jackson.
6 Q Did he make any statement with reference to calling
7 the police?
8 A He said he called the police and the -- I don't recall
9 whether he said he called the police or not.
10 THE COURT: Now, which one was that?
11 THE WITNESS: Dennis.
12 BY MR. RICHARDSON:
13 Q Did he make any statement as to why he and Blake were
14 at another place that morning after they had left the four at the
15 bus station?
16 A He said they wanted to be sure that the people got
17 on the bus or either see that they were arrested, see what hap-
18 pened to them.
19 Q Did he say anything about what would happen if they
20 were arrested?
21 A He said his intentions -- he had been up all night,
22 and he intended to go back home and go to sleep. He didn't plan
23 on being arrested.
24 Q Did you talk to him later on that morning?
25 A Yes, we did.
26 Q And who was present then?
27 A Captain D'Artois.
28 Q At that time and place when you and D'Artois questioned
29 him again did either one of you make any promises or threats
30 or inducements to get him to talk any more about this case?

1 A No.

2 Q What did he say then?

3 A The second time we talked to him and asked him about

4 his affiliations, he said he was employed by Southern Christian

5 Leadership Conference. Said he gets a salary from Martin

6 Luther King.

7 Q I am talking about David James Dennis right now.

8 A Oh, I beg your pardon. The second time we talked to

9 Dennis we talked to Blake previous. I would like to refer to

10 my notes on that.

11 Q Captain Bryant, while you are referring to your notes

12 let me ask you this question. After you talked to Dennis the

13 first time did you talk to Blake in the meanwhile?

14 A Yes, sir.

15 Q Then, you went back and talked to Dennis again?

16 A Yes, sir.

17 Q And what was the purpose of going back and talking

18 to Dennis again?

19 A We caught Blake in a lie.

20 Q Now, after you talked to Dennis the second time

21 did you talk to him a third time about the tickets or about

22 anything else? Now, after you had talked to David --

23 MR. STONE: (Interrupting) Just a minute. I didn't

24 get the answer to that question. Did he answer it?

25 BY MR. RICHARDSON:

26 Q We will come back to that in a minute, Major Bryant.

27 Let me ask you this. Did you talk to Harry Blake that morning?

28 A Yes, we did.

29 Q And who was present when you talked to him?

30 A Captain D'Artois.

1 Q Did you or Captain D'Artois say or do anything by
2 way of promises or threats or inducements to get Harry Blake
3 to talk about this case?
4 A No, we didn't.
5 Q Now, what did Harry Blake say with reference to his
6 part in this case when you first talked to him the first time?
7 A Regarding this case?
8 Q Yes.
9 A We went through his past a little. Blake said he had
10 no knowledge of this, that is, when we first started talking,
11 he had no knowledge of what was going on. He said that Dennis
12 called him at four o'clock that morning. He was up, that he
13 was making up some stencils to go in some papers he was going
14 to run off. And he said Blake told him he wanted to go with
15 him, he was going to carry some passengers to the bus station.
16 He wanted to know if he would ride along. He said yes. So, he
17 said that Dennis and the four passengers picked him up. And
18 his intentions -- he had talked to Dennis. They were supposed
19 to come back to his house after they dropped them off and Dennis
20 was going to help him cut some stencils. I dispatched a patrol
21 car out to Dennis' house after we had this part of the conver-
22 sation, checking to see if Blake's car was there. And he found
23 it out there, the license number issued to Blake. We, of course,
24 continued our interrogation, and that was about the extent of
25 that part involving the lie, I was mentioning.
26 MR. STONE: If Your Honor please, we object to the
27 Major's continuous reference to one of the defendants as having
28 told a lie. It is a conclusion on his part. We ask that it be
29 stricken from the record and that he be admonished by the Court
30 in the future to refrain from designating, referring to statements

made by either of these defendants, particularly, by this minister as being a lie or in any other derogatory manner such as this.

THE COURT: There will be no point in having it stricken from the record, since I am the only one to consider the matter at this time. The objection is overruled.

We will recess for five minutes.

(Whereupon, at 3:45 p. m. court was recessed until 3:55 p. m. of the same day.)

AFTER RECESS

HOMER C. BRYANT

resumed the stand as a witness on behalf of the State, having been previously duly sworn, and testified further as follows:

DIRECT EXAMINATION

(Continued)

BY MR. RICHARDSON:

Q Major Bryant, before the recess, I believe you stated that on your first conversation with Harry Blake he said that he was picked up by the other folks. Is that correct?

A Yes, sir.

Q Then, after you checked back again with David Dennis you talked once more with Blake, and what did he say then about his car or anything of that nature?

A Then, he said that Dennis called him about four o'clock and that he drove his car over to Dennis' house at Dennis' request.

Q For what purpose?

A To pick up these people in case they had more than they expected. I believe to start with they expected seven or eight, and would need two cars. So he brought his car over there

1 to afford transportation.

2 Q Now, when you first talked to Harry Blake on your

3 first conference that morning, he stated that he didn't know

4 anything about this till four o'clock in the morning?

5 A That is right.

6 Q But, after you checked back with David Dennis again

7 to make certain that he was telling the straight of it, did you

8 talk to Blake again?

9 A We did.

10 Q And what did he say then about talking to Dennis about

11 going down there?

12 A Then, he said Dennis had came by earlier -- well, the

13 next day in the afternoon or evening of the day prior to Friday,

14 when this happened, and discussed this situation with him, what

15 they were going to do. He said they didn't discuss a local

16 test. They discussed --

17 MR. STONE: (Interrupting) Now, just a minute. Ex-

18 cuse me, please. If Your Honor please, we are going to object

19 to what Dennis told Major Bryant or what Blake told Major Bryant,

20 unless this conversation took place in the presence of both of

21 these defendants. Now, it is pretty difficult for me to dis-

22 tinguish beforehand what he is going to say Dennis said about

23 Blake or who he is going to be talking about, until he does it.

24 THE COURT: I think you can rest assured that the

25 Court will consider only what each defendant told the officers

26 as to that defendant and not as to the other defendants.

27 In other words, what Dennis told Major Bryant that Blake said

28 is not going to be considered, but what Dennis told Captain

29 Bryant will be considered as to Dennis' intent.

30 MR. STONE: I would appreciate it, if the Court please,

if the Court feels that we have a right to have such testimony excluded, that it would not be that the witness would be instructed not to tell that part of the testimony in view of the fact that it penalizes these defendants considerably, at least, insofar as the cost of the record is concerned, by letting into the record so much that has no legal right there. And if it is discernible from the testimony at the time it is offered that it will not have any bearing or any relevancy, I would appreciate it if we could eliminate it at that point.

THE COURT: Well, as I understand the objection, Captain Bryant, you will limit your testimony concerning what each one of these defendants said to you/as to that defendant who was then talking to you. In other words, don't give us testimony that Smith told you that Jones did so and so; that Smith told you that Smith did so and so is the only thing that will be considered by the Court.

MR. RICHARDSON: If it please the Court, I think that is what he was doing. I think counsel misunderstood.

MR. STONE: I am sorry.

BY MR. RICHARDSON:

Q Now, Major Bryant, my question is simply, what did the defendant Blake say on the second conference with you with reference to his having arrangements prior to that morning to participate in this incident?

A He said that he had agreed with Dennis to go to the bus station to carry these people down there.

Q Did he say on what day they had had that agreement?

A They had that agreement on Thursday prior.

Q The day before?

A The day before.

Q Now, then, did you during the morning also have a conference with Harold D. Bethune?

A Yes, we did.

Q Who was present at that time?

A Captain D'Artois.

Q And did you or Captain D'Artois or anyone else to your knowledge or in your presence say or do anything by way of threats or inducements or other promises to get the defendant Bethune to talk to you about this case?

A No.

Q Now, tell us what he said about his part in this case.

A Bethune said that he was -- he had met with this group, planned this thing, that he had not intended to get arrested here. He said that he picked up Levert Taylor and went on to Dennis' home. And from there they picked Deloris and Marie up and returned. He said they then were driven to the station by Dennis and Blake in his automobile, Bethune's automobile. And that Dennis was to return his automobile back to Blake's home after he had dropped them off. He did not figure on getting arrested here, and was going on to Jackson to test facilities there after testing them here. I asked him why he didn't think he would get arrested here, and he made the statement he thought we had seen the light. We went into his affiliations.

Q Did he tell you what organizations he was connected with in connection with this case?

A Yes, sir. Member of the CORE, NAACP.

MR. STONE: If Your Honor please, we object to that as being irrelevant and immaterial.

THE COURT: Sustained.

BY MR. RICHARDSON:

1 Q Did you on that same morning talk with Levert Taylor
2 about this case?
3 A Yes, we did.
4 Q Who was present?
5 A Captain D'Artois.
6 Q Did you or Captain D'Artois say or do anything towards
7 him to get him to make a statement about this case either by
8 way of threats or promises or inducements?
9 A No.
10 Q And what did he say about his part in this case?
11 A He said he had purchased his own ticket for this
12 thing Wednesday prior to this Friday. He was arrested. Said
13 the other four had purchased the tickets themselves. He said
14 he had met with the group to plan this thing, that he didn't
15 anticipate getting arrested here, and planned to go on to Jackson.
16 Q Did you talk to Deloris McGinnie with reference to
17 this case?
18 A Yes, we did.
19 Q And who was present?
20 A Captain D'Artois.
21 Q Did you or Captain D'Artois or anyone else to your
22 knowledge or in your presence say or do anything by way of
23 threats or promises or inducements to get Deloris to make any
24 statement at all?
25 A No.
26 Q Did she make a statement at all?
27 A No, she didn't.
28 MR. RICHARDSON: Witness tendered.
29 CROSS EXAMINATION
30 BY MR. STONE:

1 Q Major Bryant, were you present in the jail upstairs
2 when they were booked in at the jail?
3 A I came in while they were being booked; yes.
4 Q Do you know of your personal knowledge whether or not
5 they had any tickets in their possession, bus tickets?
6 A I was told they had some. I didn't see them.
7 Q You do know, I believe, that your records indicate that
8 they had tickets among their personal possessions?
9 A Our records indicate that.
10 QQ Bus tickets?
11 A Yes.
12 Q Tickets to a destination outside of the city of
13 Shreveport?
14 A That is correct.
15 Q I believe you said that Dennis indicated to you that
16 Reverend Blake was not a part of this group. Is that true?
17 A That was my indication.
18 Q And the Reverend Blake himself also denied -- that is,
19 Harry Blake here, also denied being a part of that group. Is
20 that right?
21 A Of the group that had the bus tickets?
22 Q Yes.
23 A Well, yes.
24 Q The only evidence that you or your office has that ties
25 it into this group and the effort to catch the bus that morning
26 was the fact that he was present, the fact that they parked some
27 few blocks away, and that he had driven his car over to Dave
28 Dennis' house that morning. Is that correct? Would that be a
29 fair statement?
30 A Are you asking me if the only evidence we have that

1 these two, Blake and Dennis, were a member of this party is that
2 they drove them over?
3 Q No. I am asking you if it is the gist of your testi-
4 mony that Reverend Blake's connection with this group was that
5 he drove his car to Dave Dennis' house that morning, and that he
6 rode as a passenger in the car with Dennis to the bus station,
7 and later as a passenger in the car with Dennis parked down the
8 street, and was later arrested and, of course, gave the statement
9 that you said. Is that the gist of your testimony as to his
10 connection with this case?
11 A I would say it was a little more than that.
12 Q Now, Major, at the bus station you were present, I
13 believe, when you said these defendants came in the bus station?
14 A That is correct.
15 Q They walked into the door to the white waiting room.
16 Is that correct?
17 A Right.
18 Q And they were intercepted somewhere near the middle of
19 the waiting room by Chief Teasley and yourself and others. Is
20 that correct?
21 A That is correct.
22 Q And at that time I believe you testified that the chief
23 told them to go to another part of the building. Is that right?
24 A That is correct.
25 Q Did he indicate the other part of the building to
26 which he wanted to to go?
27 A He pointed.
28 Q Was he talking about -- was he pointing in the direc-
29 tion of, or did he mean, as far as you know, the colored waiting
30 room that was nextdoor?

1 A He pointed to the interstate waiting room.

2 Q Is that the colored waiting room nextdoor?

3 A Yes.

4 Q And did he tell them that -- words to the effect that

5 they were violating state law and city law by being present in

6 the white waiting room or words to that effect?

7 A After he had told them they were threatening to breach

8 the peace and they refused to leave he told them they were vio-

9 lating the law.

10 Q Did you understand their presence in the bus station,

11 Mr. Bryant, to threaten a breach of the peace? Is that what

12 you understood?

13 A You are asking me if I understand their presence there

14 is a threat to the peace?

15 Q Yes. I think we both understand that is what I am

16 asking you; yes.

17 A You are asking my interpretation of the law?

18 Q No. That isn't what I am asking you. That is why I

19 hesitated to say it a minute ago. You were there at the bus

20 station in your official capacity, and so was Chief Teasley,

21 I assume, at that time?

22 A Correct.

23 Q Now, when these people came into the bus station,

24 into the white waiting room, did you consider that to be a threat

25 to the peace?

26 A Absolutely.

27 Q And was that the impression that was given to these

28 defendants by the chief of police, that their presence there

29 was a threat to the peace, and that they were violating the

30 city law?

MR. RICHARDSON: If the Court please, we object to any impression these defendants might have gotten as related by this witness from the chief of police. I think it is about fourth hand right now.

MR. STONE: If Your Honor please, I think thecounsel is eminently correct, and I withdraw that question.

BY MR. STONE:

Q What was your impression of the order and the attitude of the chief of police toward -- I am sorry. That doesn't do it, either. Were these defendants, Mr. Bryant, free to solicit information about bus schedules in reference to the departure time, the arrival time of buses, and so forth, from the desk clerk without leaving the waiting room and going around to the colored side? Could they have done this in the white side?

MR. RICHARDSON: If the Court please, I believe he is calling for a conclusion of the witness. I don't know what he is getting at exactly. I don't know what the purpose of it is. If he could state the relevance, it might be that we could find out something.

MR. STONE: If Your Honor please, I think that it is very relevant in this particular instance, as I am about to set forth. Quite frequently, as it could have been in this case, what the police officer intends can be discernible not only from the words that he speaks, but rather from his actions in reference to the defendant or the person that he may subsequently take in custody. What I am trying to find out in this case is whether or not these defendants were -- whether or not it was clear to them that they hadto leave that side of the bus station, that waiting room, or whether or not they would have been permitted to take seats in that side and inquire of whatever they

1 wanted to find out at the information desk there.

2 THE COURT: The difficulty with that kind of question

3 is manifest. What this group of four people at five o'clock

4 on this particular morning after a telephoned warning to the

5 police might have been able to do physically or what they might

6 have been permitted to do by the police, or what any one of them

7 might have been able to do or might have been permitted to do

8 at this time might be entirely different from what anyone of

9 them or all four of them might have been allowed to do or could

10 have done physically at some other time and place, none of which

11 has any bearing on the particular case.

12 MR. STONE: I take it, then, that the Court overrules --

13 THE COURT: (Interrupting) I can't allow you to ask that

14 question. What these people could do, or whatthis officer might

15 allow singly or as a group might be entirely different from

16 what one of the others might have allowed them to do.

17 MR. STONE: That is not what I am trying to ask, if

18 Your Honor please. The question I am asking is whether or not

19 these defendants that morning were directed to leave this wait-

20 ing room and go --

21 THE COURT: (Interrupting) You may ask that.

22 BY MR. STONE:

23 Q Mr. Bryant, in words, or in the effect of the words

24 used by the chief of police were these defendants directed to

25 leave this waiting room and proceed to get any information that

26 they wanted to get on the colored side?

27 A They were directed to go to the other side, inasmuch

28 as they were threatening the peace.

29 Q Did they do anything in the waiting room, any act in

30 the waiting room, other than come in, that would breach the peace?

MR. RICHARDSON: If the Court please, I believe that is what the Court will have to finally decide when we get all through.

MR. STONE: I will withdraw it.

BY MR. STONE:

Q What did they do when they came into the waiting room, Mr. Bryant, please?

A They walked through the door in a direction toward the ticket counter.

Q And they were intercepted by the chief of police, and that is when this exchange that you mention took place. Is that correct?

A That is when this conversation took place; yes.

Q Major, did you have any occasion at that time to observe the conduct of other people who were present in the room at that time?

A I did.

Q What happened, please?

A Well, there were people looking, milling around, a few of them.

Q Nobody threatened these defendants in any way, did they?

A I don't know how they could have got to them.

Q What do you mean; there were so many police officers or sheriff's deputies around?

A There was enough.

Q And your testimony is, then, that no one did?

A No.

Q No, no one did; or no, that is not your testimony?

A No one did; no.

1 Q After Chief Teasley told them that by being present
2 there or words to that effect they were violating both city and
3 state law, what took place then?
4 A Reverend Bethune said something to the effect that
5 there was an Interstate Commerce, ICC ruling, I believe he called
6 it, that stated they could go into an interstate waiting room.
7 Q And what did the chief say to him at that time?
8 A Well, the chief at that time remarked something to
9 the effect, "Have you got tickets?" That came up. Asked him
10 if he had tickets. He first said that he didn't, and then he
11 said he had tickets. And he wanted to check a bus schedule.
12 And he told him he was threatening to breach the peace. And,
13 then, that is when this thing, this ICC thing came up. Then,
14 he told him that he was threatening to breach the peace again.
15 And he told him that two or three times. I heard it twice I
16 know of.
17 Q And, then, the chief placed them under arrest?
18 A He told them that he would be placed under arrest if
19 he didn't obey police orders, orders he gave him. And he said
20 it would just have to be that way, or words to that effect. In
21 other words, he was submitting to arrest.
22 Q Mr. Bryant, you testified in effect that there were
23 quite a few police officers present in the station. You didn't
24 say how many, but there were quite a few. Is that correct?
25 A There were quite a few.
26 Q Did your presence, the presence of, say, all of these
27 police officers in the bus station cause any curiosity that you
28 noticed, or any restlessness or anything of that sort on the
29 part of the people who were in the waiting room at that time?
30 A I don't know how restless these people are. I have

never seen them before. Ordinarily, I don't know anything about the people that were sitting in the bus station. Some of them were moving around and some of them were sitting still.

Q They were moving around and sitting still before these people came?

A Certainly.

Q They continued to move around or sit still after these people came?

A Sure.

Q Major, you testified a few minutes ago that you did not threaten Blake or Dennis or Bethune or Marie McGinnie in any manner in an effort to secure any statement from them. Did you offer them anything or make any statements to them that could reasonably have been interpreted as an offer of some benefit to them?

A Absolutely none.

(Witness excused.)

HARVEY D. TEASLEY

called as a witness on behalf of the State, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RICHARDSON:

Q Please state your name and occupation.

A Harvey D. Teasley, Chief of Police, Shreveport Police Department.

Q Chief Teasley, how long have you been chief of police?

A About six years, a little over.

Q How long have you been with the Shreveport Police Department?

A Twenty-four years.

1 Q Chief Teasley, did you have occasion on August 4th
2 of this year to be at the bus station here in Shreveport in con-
3 nection with this case?
4 A Yes, sir.
5 Q What was the first notice that you received that there
6 might be some disturbance or some reason for you to have some
7 officers at the bus station the next morning?
8 A Major Giglio called me about four o'clock in the
9 morning, maybe shortly thereafter. And on information that they
10 had received an anonymous telephone call at the station to have
11 plenty of policemen at the bus station that they were expecting
12 some type of trouble.
13 Q Now, you got that message from Major Giglio?
14 A Yes, sir.
15 Q And that was about four o'clock in the morning?
16 A Yes, sir.
17 Q That there would be some trouble and some police
18 officers would be needed there?
19 A Yes, sir.
20 MR. STONE: We object to that, if Your Honor please,
21 as being hearsay. What we are trying to drive at, if Your
22 Honor please, I think it is relevant to show that he got some
23 information that sent them to the bus station, but that there
24 was going to be some trouble there, of course, is hearsay, and
25 we object to that on that basis.
26 THE COURT: The existence of the anonymous phone call
27 is relevant, but the content would be hearsay, and your objec-
28 tion is sustained.
29 BY MR. RICHARDSON:
30 Q Now, Chief Teasley, was that the first notice you had

gotten from any of the members of your staff there at the station?

A Yes, sir.

Q Had you had any earlier notice that you had not transmitted? I will not ask you to tell me where it was from. Had you had any earlier notice from any source that was reliable?

A Yes, sir.

Q And had you or had you not relayed that information to Major Giglio before?

A No, sir.

Q Then, on the morning that you went to the bus station, am I correct that you had two sources of information, one that was not in your staff, and the other one which was Major Giglio? Is that correct?

A Yes, sir.

Q Then, when you went down there who had charge of the officers that were -- the city police officers stationed around the building and in and out of the building?

A I told Major Giglio that morning when he talked to me, to call in the men that he wanted to, to carry down there, that I would meet him down there in just a very few minutes.

Q Then, did you leave it up to Chief Giglio or Major Giglio to station whatever men he thought would be necessary?

A That is right.

Q Now, then, whom did you have to go with you or what was your plan in going down there?

A To see that the order was carried out, see that he had enough men available. I had talked with Chief Goslin on a previous call there earlier. And to supervise and conduct the activity, if there would be any disturbance or see just what the reason and the purpose was for the nature of such call.

1 Q Now, had you and Chief Goslin been in communication
2 the day before with reference to a reliable source that you had?
3 A Yes, sir.
4 Q And you and Chief Goslin had your own plans. Is that
5 correct?
6 A Yes, sir.
7 Q Then, when you got to the station whom did you take
8 with you or whom did you have under your immediate supervision,
9 I mean, excluding Chief Giglio and his group?
10 A I had Major Thomas, Major Orval Richards.
11 Q What was Major Richards' duties when he got there?
12 A To take pictures. He is identification bureau, and
13 photography.
14 Q What was Major Coles Thomas' duties when he was
15 there?
16 A Observe, take down any information that was necessary,
17 provided we did have trouble, question witnesses, to assist, aid
18 the men, possibly, if any arrests were to be made or whatever
19 trouble that would arise or be caused, to more or less assist
20 me in helping prevent that.
21 Q Now, then, am I correct that Major Giglio was in charge
22 of the city police officers around the outside, and you had your
23 men assisting you, that is, Coles Thomas and Orval Richards. Is
24 that correct?
25 A Yes, sir.
26 Q Now, of course, you stated a moment ago you already
27 had arrangements with Chief Goslin of the Sheriff's Department.
28 Is that correct?
29 A Yes, sir.
30 Q And they made their own plans. Is that correct?
A Yes, sir.

1 Q Now, when you got down there what was the first thing
2 that you saw or did or observed with reference to this case or
3 this bus station difficulty?
4 A When I first arrived?
5 Q Yes, when you first got there.
6 A When I first arrived, Major Giglio and a few of the
7 officers were out in front, some of the sheriff's deputies,
8 and I talked with Major Giglio briefly, casing the situation,
9 asked if he had any other calls or any more information had
10 come in with reference to what type of trouble it might be, and
11 so forth. And then I made the rounds to check with the men,
12 talked with them and went into the bus station coffee shop.
13 Q When you talked to Major Giglio, when you first arrived
14 there, did you know of two calls that had been received by Doyle
15 and Giglio or just one?
16 A One.
17 Q Just one?
18 A Yes, sir.
19 Q Now, then, after you got inside the station what did
20 you first do?
21 A Looked around the bus station to more or less -- entered
22 the coffee shop to see if there was anything unusual. We had
23 had calls down there in the past with reference to trouble and
24 disturbances, and informed the men to break up or disband any
25 groups or to question them with reference to their activities
26 down there in that area. Out on the sidewalk, entering or leav-
27 ing the bus station, if they so desired, and thought it necessary
28 for the best interest of the public, their safety and welfare.
29 There was a group of pinball machines there in one area, and a
30 group of boys approached to play those pinball --

1 MR. STONE: (Interrupting) Just a minute, please,
2 Chief. Your Honor, we object to that as being irrelevant and
3 immaterial.
4 THE COURT: Sustained.
5 BYMR. RICHARDSON:
6 Q Now, after you looked around in the coffee shop and
7 after you saw the boys over at the pinball machine, then, what
8 did you do next?
9 A I walked on the outside and ordered Officer Meecham
10 to talk to the boys and remove them from the bus station, ask
11 them to move on.
12 Q Then, what did you do after that?
13 A Come on back inside of the bus station.
14 Q What did you do next?
15 A We waited around. It was about, on, that was -- we
16 had had coffee and waited around in the bus station, walked
17 around various parts, inside and outside, keeping surveillance.
18 And, oh, along about five-twenty, I imagine, in that neighborhood,
19 why, then, a group of four of them, these people -- I believe at
20 that time I noticed briefly talking to officer Meecham, and then
21 proceeding on into the bus station.
22 Q Could you see them talking with Officer Meecham through
23 the door way?
24 A It is a glass door.
25 Q And you were on the inside?
26 A Yes, sir.
27 Q All right. Just tell us what took place after that.
28 A And they proceeded to the inside. I met the people
29 coming in, and I believe Bethune there, the preacher, was in
30 the lead with the others following. And in this particular area,

1 almost center of the bus station, if I am correct in saying,
2 it was approximately two people sitting on a seat there, and
3 when I stopped them and identified myself as Chief of Police,
4 wanted to know his reasons and purposes thereof, his whereabouts,
5 and those people got up and the crowd started moving in. But I
6 had asked him -- he told me his name. I asked him where he was
7 going. He said he was going to check the bus schedule and make
8 arrangements for tickets. And I asked him to move on out of the
9 bus station. And he told me that he wanted to go and check the
10 bus schedule. And I told him that if he didn't obey my order
11 to move on from the bus station that he would be violating the
12 breach of peace laws of the State of Louisiana and the City of
13 Shreveport.
14 Q Did you see the ticket counter over there? Do you
15 know where the ticket counter is down there?
16 A Yes, sir.
17 Q Is that ticket counter served -- does that ticket counter
18 serve both waiting rooms?
19 A Yes, sir.
20 Q And when you told him to move on did you tell him where
21 to move on to or not?
22 A I pointed to the lady standing at the counter in the
23 waiting room there and told him to move on out that way, that
24 he had just passed the place to seek that information.
25 Q Did you see the group as they first moved up to Officer
26 Meecham on the outside?
27 A No, sir. I looked up. I was about middleways sideways
28 looking back towards the pinball machine, in that direction.
29 And just as they approached I didn't see them coming up. They
30 was already there with Officer Meecham when I first saw them.

1 Q Well, when you directed him to move on and pointed
2 over towards the lady at the ticket counter -- does that ticket
3 counter serve the interstate waiting room?
4 A Yes, sir.
5 Q Does it serve also the intrastate waiting room?
6 A Yes, sir.
7 Q Did he tell you where they were going?
8 A Jackson, Mississippi.
9 Q Then, when you told him to go to the interstate wait-
10 ing room, is that the place where interstate passengers have a
11 sign on the outside of the door marked "Interstate Passengers"?
12 A Yes, sir.
13 Q The waiting room where you were, is that in the room
14 that is marked "Intrastate waiting room"?
15 A Yes, sir.
16 Q How many times all told, Chief Teasley, did you re-
17 quest or order him to move on to the interstate waiting room?
18 A About four times.
19 Q And what did he say after the first time that you ordered
20 him to move on?
21 A He stated that he wanted to go over here, wanted to
22 walk over here; made some reference with the Supreme Court Ruling,
23 which I told him that I didn't think was in question here, it was
24 a matter of the Supreme Court ruling, because my purpose there
25 was to preserve the peace, and that he was definitely defying my
26 order if he refused to move on, to the best interest and safety
27 of the public, the best interest to their welfare, as well as the
28 other people around there, for the purpose that we had been called.
29 And I think Bethune said that, after I had explained again to
30 him and asked him to move on, asked them to move on out, that if

that is what it meant -- I asked him if he was defying the law or disregarding my orders, and he said, "No, sir. If that is what it means I prefer going to jail." And then I ordered him out one more time. They refused to move. So I placed them under arrest.

Q Now, when you spoke to them were you speaking to all four of them?

A Yes, sir.

Q Were you addressing all four of them?

A Yes, sir. He was the spokesman, and they were around him.

QQ Now, when he first came up I believe you testified a moment ago you asked him where he was going, and he said he wanted to buy a ticket. Is that correct?

A Yes, sir; check the bus schedule.

Q And after you told him where to buy the ticket and directed the place to interstate waiting room and ordered him to move on, is that when he said something about checking the schedule?

A Yes, sir.

Q And, then, after you told him the same thing again that he could find out the schedule over there at the interstate waiting room, what did he next say? Did he say whether he had any tickets or not?

A No, sir, he never did tell me whether he had any tickets.

Q Did he ever produce any tickets to you?

A No, sir.

Q Had you ever seen any tickets that morning at the bus station?

A No, sir.

Q Then, after the fourth or fifth time, is that when you placed them under arrest?

A Yes, sir.

MR. RICHARDSON: The witness is tendered.

CROSS EXAMINATION

BY MR. STONE:

Q Chief Teasley, these words "inter-" and "intrastate" kind of get me confused sometimes. All this took place in the white waiting room over there, didn't it?

A It took place in the intrastate waiting room.

Q Is that -- were any negroes in that waiting room, negro passengers in that waiting room, as far as you know?

A They were the only four in there at that time.

Q Now, the one to which you directed them to go, which one is that?

A The interstate.

Q Is that the colored waiting room?

A It is the interstate passengers' waiting room.

Q And are white people allowed to go and take seats and be served in that waiting room?

A It is just interstate. We have never had any occasion to ask anybody out or any cause to run anybody out. It is interstate.

Q Now, do you have any occasion -- are negroes permitted to use the facilities on the other side over there where you were that night?

A I don't know. We come in and out as we are called, as we have done on many other occasions. I recall just shortly, a couple or three weeks ago, just a couple or three weeks prior

1 to that, we had a similar situation existed. We had been alerted
2 and called for the purpose of preventing the breach of the peace
3 in that particular area. And I believe the two girls in question
4 there at this particular time was there at that time. And the
5 white and colored both that were ordered to move on, and the other
6 people so ordered that particular morning, everyone did. And we
7 had no occasion at that time to arrest anyone.
8 Q Chief Teasley, you knew beforehand these people were
9 coming down there -- not these particular people, but you knew
10 that some negroes were coming down there and that they were going
11 to use the white waiting room, didn't you?
12 A I didn't know who they would be.
13 Q But, you did know that some negro people --
14 A (Interrupting) There was an alert for trouble, as we
15 have had in many other places, not only the bus station. We have
16 had it at the railroad station.
17 Q Chief, when you went down there you didn't know anything
18 -- is it your testimony that when you went down there you didn't
19 know anything at all about whether or not some negroes would make
20 an attempt to ride the bus from the white waiting room?
21 A There hadn't been nothing said to me about riding the
22 bus, made no mention about riding the bus.
23 Q Did you know whether or -- is it your testimony that
24 before you went down there that night that you did not know that
25 negro freedom riders or so-called freedom riders would attempt to
26 desegregate the facilities at the bus station?
27 A Nobody had talked to me with reference to freedom
28 riders or segregation or desegregation or integration. My infor-
29 mation was that it was strictly on the basis that there would
30 possibly be trouble in the neighborhood or the area of the bus

station.

Q And you didn't --

A (Interrupting) And to send plenty of policemen.

Q And you didn't have any idea what kind of trouble that might be or anything?

A No. I had more at the time before than I did this particular time.

Q All right. Now, then, you have been chief for about six or eight years, and you have been a police officer in Shreveport for almost twenty-four years; I believe you said about twenty-four years.

A Yes.

Q Aside from these two times have you ever been assigned that beat down there, Mr. Teasley, down near the bus station?

A Worked that beat?

Q Yes, sir.

A I never was assigned to walk that beat.

Q Do you know generally about that beat? You have had at one time the responsibility for assigning men to that beat, have you not?

A That is right.

Q Do you know that the intrastate waiting room, the one you were in that night, is the commonly-called white waiting room down at the bus station?

A As I said before, there was no question arose or brought up with reference to white, colored, segregation, or integration.

Q I understand that. I am asking you now, do you know of your own knowledge that the so-called intrastate waiting room down there is the white waiting room?

1 A I couldn't say positively that it was absolutely white
2 or had any colored people ever used it or did not use it. I
3 couldn't say that for a positive fact.
4 Q Chief Teasley, let's be realistic about this. We have
5 white people and colored people. You know that, don't you, Chief?
6 A That is right.
7 Q And you know that in the city of Shreveport that, as
8 far as you and I know, facilities are segregated, don't you?
9 A Not altogether.
10 Q All right. Now, what I am asking you is, are there
11 two rooms at the bus station, one that is for colored people and
12 one is for white?
13 A Yes. There is three rooms down there; four.
14 Q Well, do you have two waiting rooms?
15 A Yes.
16 Q Do you have separate waiting rooms, one waiting room
17 for white and one for colored?
18 A You know that. It has always been there ever since
19 the bus station.
20 Q That is what I want to know. So, we do have it?
21 A Yes.
22 Q Now, then, you were in the white waiting room, were
23 you not?
24 A I was in the intrastate waiting room.
25 Q Is that the white waiting room?
26 A It is intrastate waiting room.
27 Q If a man is --
28 THE COURT: (Interrupting) Just a minute. Chief, that
29 is a pretty simple question to answer. You haven't answered it.
30 THE WITNESS: Your Honor, can I tell him what the

signs are up there on the -- that is what I have been trying to tell.

MR. RICHARDSON: May I make a statement along that line, Judge? I have been down there and it says "intrastate waiting room", and the other one says "interstate waiting room". And we have got got all sorts of rulings from the United States Court. And, now, we have got allegations about interstate commerce --

MR. STONE: (Interrupting) May I be heard on this, if Your Honor please?

THE COURT: One at a time.

MR. STONE: If Your Honor please --

THE COURT: (Interrupting) Just a minute. Have a seat. I think the only reason for asking the question is to find out whether this incident occurred in the waiting room that always used to be the white waiting room.

MR.STONE: Yes, sir.

THE COURT: And, still, as far as I know, ordinarily, nobody but white passengers go in this place where this incident occurred, as far as I know.

THE WITNESS:Well, that is me, Your Honor.

THE COURT: And, as far as you know, nobody but white passengers go in that place where the incident occurred.

THE WITNESS: That is right.

THE COURT: Generally speaking.

THE WITNESS: Yes, sir.

THE COURT: Does that answer your question?

MR. STONE: Yes, sir, that is correct.

BY MR. STONE:

Q Then, when these people came in there and you told

1 them that they could buy the tickets over there, you were telling
2 them to go over there to that waiting room that, asfar as you know,
3 is used only by colored people, weren't you, Chief?
4 A I didn't say that, Jess. All I told -- and I think
5 Bethune would tell you, as I told you, that I pointed over there
6 to where the lady was standing, and that they had bypassed her
7 to get the information or to make arrangements for the tickets.
8 Q Yes, sir. That is true.
9 MR. STONE: But, if Your Honor please, here we go
10 again. I am asking -- I am suggesting by my question that when
11 he told me that he was pointing this way he could be pointing at
12 the door, or he could be pointing at Mr. Burns sitting over there.
13 I am just trying to find out from him where he was telling these
14 people to go.
15 THE COURT: Well, can you tell us, Chief?
16 THE WITNESS: Your Honor, the lady was standing over
17 there at the counter that serves on the interstate passengers --
18 she was standing there. There is two counters there, one this
19 way and this counter over that way, and I pointed -- I never did
20 make any reference to any waiting room or any other room, other
21 than to point to that white lady that was standing there, and
22 told them that they bypassed the place to get the information
23 and the tickets that they were seeking.
24 THE COURT: I think the answer is clear.
25 BY MR. STONE:
26 Q Was that lady standing in the same room that you were
27 in?
28 A In the counter. The counters were all built in adjoin-
29 ing on one floor level with partitions separating, but you could
30 see from this counter here at the front to this counter here.

You could see the entire surface of both waiting rooms.

Q You intercepted these people as they came in about the time they got to the middle of the floor you said a minute ago, I believe.

A That is right.

Q Weren't they walking in the direction of that lady at that time?

A No, they weren't, because she was standing over here, and they were walking over more to the center of the floor when I stopped Bethune. I think with the pictures --

Q (Interrupting) Now, when you told them to go talk to that lady right there, you said you told them, "You have just passed by the door".

A I didn't say door.

Q You said they just passed something. What did you say?

A The place.

Q What place were you referring to?

A The entrance to the interstate passengers waiting room.

Q And the intrastate waiting room, the one that you and I recognize as the colored waiting room, is that the one you are talking about?

A Now, you are speaking for yourself.

Q Well, I am asking you, is that the one that you recognize as being the colored waiting room, Mr. Teasley.

A I recognize them for exactly the purpose that I was down there, whether it be colored or white, to preserve the peace.

Q Mr. Teasley, I want you to know that I know that you were doing down there what you thought was your duty, and I am not questioning that one bit now. All I am trying to find out, of course, is what you did do, so that the Court here will be

able to know.

A Well, I just told, Jess, the Judge, about the part, it is about -- it only took from the time that I started talking to Bethune -- it only consumed approximately three minutes, a little thereafter. And what I tried to sum up and say in one sentence -- and I believe they will verify that, that at no time did I make reference to anything regarding a colored waiting room or a white waiting room, or segregation or integration, or desegration, other than to explain to him that if he failed to carry out my order he would be violating the breach of the peace.

Q Yes, sir. I understand. Now, what I am trying to get at is this: I know you didn't say anything about white or colored to them, according to the testimony I have heard, but they were in one place and you indicated to them that they should go to another Is that correct?

A I didn't indicate. I pointed to the lady standing over there, where that he could go to get that information.

Q All right. Then, you told them they should go to the other place. Now, all I am trying to find out is, is the place that you told them to go to buy their tickers,or to get any information that they wanted, or to sit down if they wanted to, is that the place that is commonly known as the colored waiting room?

A Let's put it this way. The colored people go in there. I have seen colored people in there. I talked to them that night in there, the same as I did white people, the time before, but I couldn't say if it was used exclusively for colored people or whether white people go in there as interstate passengers, the same as I said with reference to the place, as I told the Judge.

It has always commonly been known as the white waiting room. Whether colored people have used that facility, whether they have used the restaurant, or whether they have used the rest rooms or what, I couldn't say, because I am not down there all the time.

Q I understand. Well, let's use your words. It is white and interstate passengers, that is above one door, I believe, white and interstate passengers. Is that correct? Or, rather, colored and interstate passengers is above one door. Is that correct?

A Which doors are you speaking of, Jess?

Q At the bus station. I don't know which it is.

A I know, but repeat your question.

Q Above one door at the bus station I believe you will find the words "Colored and Interstate Passengers". Is that correct?

A No. On one door you find, "Interstate Passengers and colored intrastate passengers".

Q And colored intrastate passengers?

A Uh-huh.

Q And on the other door you find what?

A "White passengers intrastate".

Q Now, under the police authority with which you are vested, will you allow a white person who is an interstate passenger to use the waiting room to which you directed these defendants?

THE COURT: I don't think that is relevant.

MR. RICHARDSON: If the Court Please, I object to it as irrelevant.

MR. STONE: If Your Honor please, I think that the

1 witness is being most uncooperative in that he refuses to state
2 matters that are very elemental. And, of course --
3 THE COURT: (Interrupting) Sometimes there are things
4 we think we know when we really don't. I can state to you that
5 I think one of those rooms is the colored waiting room and one of
6 them is the white waiting room, but, as a matter of fact, I
7 haven't been in the bus station more than twice since the thing
8 was constructed. So, what I tell you I know, I may not know.
9 What this witness is trying, I think, very carefully to do, is
10 stick precisely to the matters that he does have knowledge of.
11 And I think he has not evaded the question. And I believe he
12 has been very careful in his answers. Now, you were asking him
13 what he would do in another case; would he allow white people
14 to go somewhere. That has no bearing on the issues of this case.
15 BY MR. STONE:
16 Q Mr. Teasley, when these people came in you say you met
17 them and asked them what they wanted?
18 A Yes.
19 Q Or where they were going?
20 A Yes. I identified myself first to Bethune.
21 Q Were there any other passengers, or were there any
22 other persons who came in the bus station while you were there
23 that morning?
24 A Do you mean at the time that I was talking with them?
25 Q No, sir; at any time while you were there did you see
26 anybody else come in the bus station?
27 A There was very few that came into the waiting room.
28 There was quite a few. I think one bus had come in that was
29 pretty well loaded, but most of those people went to the restau-
30 rant part, came in the front entrance off of Fannin Street there.

1 Q Did you observe anybody come into the waiting room
2 where you were before these defendants came in?
3 A Very few, other than the officers passing back and
4 forth. After we removed the boys from the pinball machines,
5 other than maybe a couple of dozen people, I would say offhand
6 that was seated here and there about the building, possibly
7 reading their newspaper or magazine, just general observation,
8 there was very little traffic, other than possibly maybe, I
9 think, a couple of bus drivers came in.
10 Q Then, you did see somebody else come in the bus station?
11 A Yes.
12 Q So, then, Mr. Teasley, when they came in did you say
13 anything to them?
14 A Well, the bus drivers were in their full uniforms
15 and caps, so --
16 Q (Interrupting) Did you say anything to the other people
17 who were just passengers who came in the bus station?
18 A I didn't particularly, but the men were so ordered on
19 the outside, and the various stations that they were patrolling.
20 Q Why did you approach these people and say something
21 to them; what caused you to approach them and stop them and in-
22 quire of their business?
23 A Well, I felt my authority and the nature of my duties
24 being down there to preserve the peace, protect life and prop-
25 erty, that I had a perfect right to question them in a courteous
26 manner and explain to them any questions that they might want to
27 ask me, and doing it for their best interest.
28 Q Did they do anything, according to your knowledge and
29 belief at that time that you took to be calculated to provoke
30 a breach of the peace?

A Yes. They disobeyed my order.

Q Before they disobeyed your order, Mr. Teasley, when they came in?

A No.

Q In other words, you were just being helpful, you wanted to help them find whatever they were looking for. Is that what you are suggesting?

A No, I wasn't, Jessie. I was trying to answer your question to your satisfaction in this respect, that I heard no part of the conversation that they had with Officer Meecham. They entered on into the bus station, and then I approached them. Had it been a group of white people, regardless, grouped together coming in in that manner, I would have approached them likewise; or if it had been a group of military men I would have approached them the same way to state my purpose and reasons for being down there, explain the law to them, because at that particular time we had cleared out the bus station as much as possible, the men had, people that had no business in there, and out of there, in there and around, because not knowing the nature of the trouble that was reported from the anonymous call, well, in other words, we were working in the dark in a sense, because it is like Dr. Jekyl and Mr. Hyde. We don't know what is going to strike next.

Q Now, Mr. Teasley, were these people free under your orders to take seats in the bus station on the side where they were?

A There was no mention ever made with reference to taking seats. In my conversation with Bethune his demand was to proceed to the counter to seek this information with reference to the schedule or the tickets.

Q And you were sending him around to the other side to

1 get that over there. Is that correct?

2 A As I told you, I pointed to the lady which way to go.

3 Q And they had just passed, I believe you said a minute

4 ago, the entrance; you told them they had just passed the en-

5 trance to the place where they could go to get that information?

6 A That is right.

7 Q In your mind, then, and by your actions, you had closed

8 to them the right to get it on that side, had you not?

9 A No.

10 MR. RICHARDSON: If the Court please, that calls for

11 a conclusion. He has already stated what he told them to do

12 and what the order was.

13 MR. STONE: If Your Honor please, he knows what he

14 intended.

15 THE COURT: The objection is sustained.

16 BY MR. STONE:

17 Q Was there any pushing or shoving or anything of that

18 sort that took place, Mr. Teasley?

19 A Not directly in front of me. Just shortly behind

20 Bethune and where the others were standing there was two people

21 that had to get up. I noticed them get up and move back out of

22 the way, but I never had the opportunity to view or see any of

23 the seats to my side or directly behind me.

24 Q Mr. Teasley, when you told Reverend Bethune and this

25 group that "you can get the information you want from the lady

26 over there", isn't it a fact that this young lady in the yellow

27 dress, or suit, whatever it is, started walking toward the lady,

28 not going back out of the door, now, going around the other way,

29 but walking directly toward the lady, and that you physically

30 restrained her and said, "Go back the other way"?

A No. Now, explain the "physical", Jess.

Q Did you restrain her in any manner?

A I -- the lady was -- like this is the front counter, and this is the counter over here. She had started at the far end. If she had wanted to she could have come from this position over here direct across to this end. She only took a couple of steps just beyond Bethune there, only took a couple of steps. I held out my hand and said, "Wait just a minute," which touched her on the arm.

Q And what did you tell her then?

A To wait there just a minute.

Q And not to go, in other words, at that time?

A I just told her to wait there just a minute, when I touched her on the arm.

Q The minute immediately before that you had told her to get the information that she wanted from the lady who was standing there?

A I didn't tell her anything. I was talking to Bethune. The only time, just as I had stopped Bethune, she made the coupld of steps a little to his right, or to his left, from the position that he was standing in the bus station. And, then, that is when I held out my hand and touched her on the arm and said, "Wait just a minute."

Q These statements that you made to Bethune, were you making them to Bethune or were you making them to all these people, or what?

A They were close enough to get the benefit of the conversation.

Q Well, maybe they were, but were they directed then at them or were --

A (Interrupting) That is right.

1 Q Or were they directed to Reverend Bethune, so that
2 when you told Reverend Bethune that he could go over here and
3 get this information from this lady you were also telling her?
4 A I was telling all of them.
5 Q But, when she attempted to go get it, you told her,
6 "Wait right here," and wouldn't let her go. Is that what your
7 are saying?
8 A I don't follow you on that, if you say attempting to
9 go. All I done was told her to stop. I was making the address
10 of my remarks to Bethune. He seemed to be the spokesman for the
11 group. So that is all the conversation that it was, because on
12 a previous occasion they were ordered out in the same manner on
13 the same type of call, and those two girls obediently respected
14 the law and walked out. They will state that themselves.
15 Q You are not talking about these two girls here right
16 now, are you, who are defendants in this case; you are not talk-
17 ingabout these young ladies, are you?
18 A Yes.
19 Q These are the same young ladies who were present?
20 A A couple or three weeks prior to that one morning when
21 several of the -- similar to the same set-up or the same call
22 with a mixed group of white and colored, walked into the waiting
23 room, and we had been alerted for trouble, and so forth. And
24 they obediently walked out that night. I am sure that they
25 understood what was said that night.
26 Q What I am trying to get to, on the occasion of the
27 arrest of these defendants in this case, isn't it a fact that you
28 told Reverend Bethune and these other defendants that, "You can
29 get the information you want from that lady right over there,"
30 or words to that effect?

1 A The time that I told her to wait a minute and stop
2 was just prior to stopping Bethune before that statement had
3 ever been made.
4 Q She didn't move after you told her to go --
5 A (Interrupting) No, sir. She certainly did not.
6 Q She didn't try to go over there to comply with your
7 wishes then?
8 A No, she didn't move. She stayed right there.
9 Q Chief Teasley, I believe you made some mention that
10 you had instructed these people that they were going to violate --
11 that they were violating the state and city laws. Is that right?
12 A Yes.
13 Q You did tell them something to that effect?
14 A Yes.
15 Q At what point did you tell them that?
16 A After I had had a few words with Bethune there with
17 reference to our opening conversation.
18 Q Well, I believe you say you came in, you asked him
19 where he was going, what he wanted, or words to that effect; he
20 told you first of all that he wanted to talk about a ticket.
21 Later, I believe, he indicated that he wanted to get some infor-
22 mation about a schedule or something of that sort?
23 A Yes.
24 Q Was it at that time that you told him that he was
25 violating the state and local laws or was it at some other point?
26 A That is right following that that I told him, and then
27 he said that he wanted to go on over there and get the schedule,
28 says, "Well, I want to go over there." And I told him that I
29 had ordered them to move on. He was violating the breach of the
30 peace if he refused to do so.

REDIRECT EXAMINATION

BY MR. RICHARDSON:

Q Chief Teasley, on the other occasion that you mentioned when they did obey the order and were not arrested, did you follow the same procedure as in this case?

A Yes.

MR. STONE: If Your Honor please, we object to that as being irrelevant and immaterial.

THE COURT: The objection is sustained.

BY MR. RICHARDSON:

Q Chief, the counter that you referred to runs in an L-shape. Is that correct?

A Yes, sir.

Q The same lady and the same staff wait on both places. Is that correct?

A Yes, sir.

Q In fact, they just turn a quarter turn to go from one to the other?

A A quarter turn, like this right in here.

Q They don't have to leave the room or go any other place. Is that right?

A No, sir.

RECROSS EXAMINATION

BY MR. STONE:

Q When the prosecutor said they don't have to leave the room in order to be waited on at that counter --

MR. RICHARDSON: (Interrupting) No --

THE COURT: (Interrupting) The question was about the woman who works on the ticket counter. She doesn't have to leave the ticket counter.

MR. STONE: You are saying the lady behind the counter does not have to leave the room?

MR. RICHARDSON: That is right.

BY MR. STONE:

Q But, Mr. Teasley, one who is in the interstate passenger waiting room legally and lawfully would have to be, if he wanted to buy a ticket in the intrastate side, he would have to go over there, wouldn't he?

A No. They don't have to move out of that -- just like this table -- only it is a little longer -- and the lady moves from one position, from this position over to this position. The tickets are up behind them like that, stamping them. They would be in any position in the L-shape enclosure there that they are behind.

Q But, these defendants could not have done that, could they?

A They couldn't have been, because they wasn't over there where the lady was. She was in behind there, the ticket counter.

Q Was it because they were not there, Chief, or because you were between them and the lady, and you stopped them before they got there and directed them to go to the lady, saying, "You have just passed the door." Isn't that why they couldn't go to the lady?

A I don't know, Jess. They passed the door. I don't know why they couldn't.

Q Well, there are two doors, Chief.

THE WITNESS: Your Honor, if I may, please, we went back through that same thing there on that with reference to -- I have tried to explain to him the setup on the ticket stand.

THE COURT: Just a minute. I think there is maybe a little misunderstanding about the question and the answer. I don't think the questioner and the answerer quite understand each other. The question, I think, is obvious, and I don't think it will add anything, and it has been brought out before. I think we are wasting time. The point the attorney for the defense is trying to make is that this ticket counter can be reached from either room, and the point you are trying to make is that the woman who works at the ticket counter can serve either room without moving, and that these four defendants here were not allowed to go to the ticket counter at the time you stopped them, and the point that the defense wants to bring out is that they might have been allowed to go to the ticket counter from the other room, whatever you want to call it. And that is about correct, isn't it?

THE WITNESS: Yes, sir.

MR. STONE: That is all, thank you.

(Witness excused.)

THE COURT: There is one remaining witness?

MR. RICHARDSON: Yes.

THE COURT: Is his testimony the same as some other one?

MR. STONE: I am willing to stipulate that Captain D'Artois will testify in every particular in the same manner that Major Homer Bryant did if he were called and sworn as a witness for the prosecution in this case.

MR. RICHARDSON: And also, if the Court please, the same as Major Coles Thomas. In other words, D'Artois was present when Blake and Dennis were arrested on the street, and D'Artois was also present when Bryant --

THE COURT: (Interrupting) All right. With reference

to the arrest of Blake and Dennis, D'Artois was present and his testimony would be the same as Coles Thomas.

MR. STONE: I am willing to stipulate that; yes, sir.

THE COURT: With reference to the conversation with the defendants his testimony would be the same as Homer Bryant?

MR. RICHARDSON: That is correct.

Your Honor, I know I have asked one or two witnesses, and I want to make sure the record shows that the bus station is located in the City of Shreveport, Caddo Parish, Louisiana.

THE COURT: It has been asked.

MR. STONE: I am willing to stipulate it.

MR. RICHARDSON: With that stipulation, then, the State closes.

THE COURT: Does the defense have any evidence?

MR. STONE: If Your Honor please, the defense does. Before the defendant puts on its evidence, the defendants have a motion that they would like to make. And, of course, I would also like to ask for a brief recess before putting on my first witness.

THE COURT: Well, I don't think we need to stay here tonight and hear witnesses. You can make your motion for a directed verdict.

MR. STONE: Yes, sir.

THE COURT: You can make it now and I will rule on it.

MR. STONE: If Your Honor please, I would like to first move for a directed verdict on behalf of David Dennis and Harry Blake on the basis of the fact that this bill of information by which these people are charged says that these defendants -- and it must mean each of them, because it says, "The Year of Our Lord One Thousand Nine Hundred and Sixty-one, and give the

said Court to understand -- "

THE COURT: (Interrupting) Your motion is based on the same matter that we went over earlier in the day, isn't it, concerning the charge of these two as principals, with the same argument?

MR. STONE: That is correct, sir; in reference to these two defendants, yes, sir.

THE COURT: I think I can save you some time by ruling on it now. I understand your position, but I think it should be familiar to everyone that in this court, not very long ago a person was charged with murder in a short form indictment. He was not present when the murder was committed and he was convicted. And that can be done, legally, in the State of Louisiana. So, the indictment, this bill of information is not defective in that it fails to specify that these two defendants who are charged as principals are charged as principals. If that is the basis for a motion of a directed verdict as to the two defendants, Dennis and Blake, then, the motion for a directed verdict is denied.

MR. STONE: If Your Honor please, now, we would like to except to the Court's ruling and reserve a bill of exception based on the grounds set forth in the motion originally, which I will at the proper time incorporate. I would like to do that, if Your Honor please, notwithstanding my familiarity with that section of the law that says that no appeal lies from the Court's overruling such a motion.

THE COURT: I was going to mention that, and also that this is a misdemeanor case and not a felony case, as I understand it; but, nevertheless, the record will show that you have excepted to the ruling and now attempt to reserve a bill.

MR. STONE: If Your Honor please, now, I wish to move

for a directed verdict on behalf of all of these defendants on these grounds.

THE COURT: Is your argument on the balance of the motion for directed verdict to be protracted? I suggest that we recess until Monday morning. If it is to be brief --

MR. STONE: (Interrupting) It is likely to be very long, if Your Honor please. It is likely to take considerable time.

THE COURT: Well, I have my doubts about that, even on Monday morning, but, in that case, we will recess until Monday morning at ten o'clock.

(Whereupon, at 5:15 p. m. o'clock, August 18, 1961, Court was recessed until 10:00 a. m. o'clock, August 21, 1961.)

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MONDAY MORNING

AUGUST 21, 1961

10:00 O'CLOCK A. M.

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MR. STONE: If Your Honor please, at the close of the session on Friday I had just moved the Court for a directed verdict on behalf of all of these defendants, and I was about to state the reasons for the motion or the basis of the motion to the Court at that time.

THE COURT: All right.

(Off the record discussion.)

THE COURT: The motion for a directed verdict is overruled. I believe the State has shown a prima facia case. Even a person so far removed from this scene as United States Attorney General Kennedy recognizes that when colored people go into a white waiting room in a place like Shreveport they have committed an act that is calculated to disturb and alarm the public.

Do you have any evidence you wish to present?

MR. STONE: I do, sir.

THE COURT: Would you like a recess for a few minutes?

MR. STONE: Just a minute before we do that, if Your Honor please. I wish to take exception to the ruling of the Court in reference to the motion for a directed verdict on the basis, first of all, that we think are implicit in the mere statements of the Court to the effect that going in a white waiting room causes a breach of the peace, that is, when negroes go into a white waiting room that it causes a breach of the peace; on the further basis that if this is what the evidence shows, which we, of course, have denied in this motion that we have just

set forth. Then, such action in bringing their arrest would be in violation -- their arrest and trial and subsequent conviction would be in violationof equal protection and the due process clauses of the 14th amendment of the Constitution of the United States.

May we have five or ten minutes?

THE COURT: You may recess for five minutes.

(Whereupon, at 10:28 a. m. court was recessed until 10:38 a. m. of the same day.)

AFTER RECESS

MR. STONE: If Your Honor please, I would like to call first Harry Blake.

HARRY BLAKE

defendant, called as a witness on his own behalf, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. STONE:

Q Will you tell the Court your full name, your address, your occupation or profession, please?

A My name is Harry Blake. I am a Baptist clergyman. My address is 2834 Abbie Street.

Q Is that in Shreveport, Louisiana?

A Shreveport, Louisiana.

Q I would like to direct your attention to the date that you were arrested in the City of Shreveport by sheriff's officers in connection with an alleged incident at the bus station. Do you remember that date?

A Yes.

Q Did you have an occasion to go to the bus station on the morning of your arrest?

A Yes, I did.

Q Shortly prior to having been arrested?

A That is right.

Q What was your business at the bus station at that time?

A Oh, I was riding with Mr. Dennis, who had an occasion to carry passengers to the bus station.

Q How did you happen to be riding with him, Reverend Blake?

A Well, Mr. Dennis called me and said that he had some passangers to go to the bus station and wanted to know if my car was available to carry some down. And I made my car available. It wasn't necessary, so I rode in the car with Dennis.

Q Did you know what you were going to the bus station for, other than to carry some passengers?

A No.

Q Did you know what the passengers planned to do once they got to the bus station?

A I knew that some citizens in Shreveport were anxious to join freedom riders in Jackson, Mississippi, and this had been indicated that these persons were going to Jackson.

Q Did you know of any impending test of the Shreveport city ordinances or the State of Louisiana statutes in reference to a segregation? Did you know of any test, I said, of those statutes that was impending?

A All I know is that they were going to Jackson, Mississippi, and that --

Q (Interrupting) I want to know if I am understanding you. Are you testifying that you had no knowledge of any impending test of such laws in Shreveport?

1 A No, I had no knowledge of such.

2 Q Reverend Blake, have you ever been convicted of any

3 crime or offense?

4 A Yes, I guess it is a crime. I was accused of careless

5 and reckless driving on two occasions. One was thrown out and

6 the other one I was convicted.

7 Q You were convicted of careless and reckless driving?

8 A Yes, sir.

9 Q Is that the only one conviction that you have had, as

10 far as you are aware?

11 A That is the only conviction.

12 Q Now, on this morning that you accompanied Mr. Dennis

13 to the bus station, will you tell the Court exactly what you did,

14 starting with the time that you consented to go down. Tell

15 the Court what you did.

16 A Well, I consented to make my car available. I got

17 up and drove to Dennis' house. And after the car was not --

18 it wasn't necessary to use the car, we got in one car and drove

19 to the bus station, and there let the passengers out and drove

20 around a block for Mr. Dennis to make a phone call. I had a

21 letter that I had planned to --

22 Q (Interrupting) Did Mr. Dennis --

23 A (Interrupting) Well, he used the phone. I don't

24 know whether he made the call or not.

25 Q You saw him pick up the phone or receiver or something?

26 A Yes.

27 Q Did you hear who he called?

28 A No. I was sitting in the car.

29 Q Did you hear him talk?

30 A No, I didn't hear him talk.

1 Q And, then, what did you do?

2 A After he did what was apparently made a phone call, he

3 got back in the car, said he was wanting to observe to see

4 whether the persons got off to Dallas or not. I had a letter

5 that I had planned to mail. We sat there for a few moments, and

6 I was going -- we were parked near the Southwestern Electric

7 Building, which was near the Post Office. I was going to walk

8 over there to mail a letter. Shortly thereafter some officers

9 came, sheriff's officers, I think, one policeman came, and arrested

10 us, asked us for -- or who we were. We identified ourselves.

11 When, we were taken off to the court house. When we got out

12 they told us to go to the court house. Well, I didn't think I

13 was under arrest, so I didn't bother about walking to the court

14 house. And one of the officers said for me to go in. I asked

15 him was I under arrest. He said, "Yes." I said, "For what?"

16 He said, "For disturbing the peace." I wanted to know whose

17 peace I had disturbed. He said, "Well, that was it."

18 Q And when you were carried up -- were you carried in

19 the jail located above this building, by these officers?

20 A Yes, I was.

21 Q You were registered in or booked in at the jail?

22 A That is right.

23 Q Were these other defendants already in the jail at

24 that time or do you know?

25 A Yes, they were. They were in the building.

26 Q They had already, as far as you know, been booked?

27 A As far as I know, yes.

28 Q Did you know when you were seated in the car parked

29 on the street down here what was planned, if anything, or what was

30 anticipated, if anything, by the people in the bus station that

you had left at the bus station?

A Did I know what was anticipated?

Q What was planned by them, or what they intended to do or anything of that sort, if they intended to do anything.

A No, I didn't know any of their plans, except for going to Jackson, Mississippi, to join the freedom riders there.

Q Reverend Blake, I believe it has been testified to by officer Bryant or someone that you are alleged to have said, or someone is alleged to have said that you attended some of the meetings of these people in which they made plans for this trip. Is that correct? Did you attend any meeting with these four defendants here, and, for that matter, with David Dennis, in which plans to test the segregated facilities at the bus station were made?

A Let me say this --

Q (Interrupting) Or discussed.

A I have attended no -- none of their private meetings. I have attended meetings that any number of citizens in Shreveport attended. They are public meetings. I have been in those meetings. And, like any other movement, they do not make any plans known to the public as such. No, I have not attended any meeting where specific plans were spelled out. I have attended only the public meetings, meetings where many citizens of Shreveport attended.

Q And is it your testimony, then, that they do not plan any such test at these public meetings?

A No.

Q No, it is not your testimony; or no, they did not?

A No, it is my testimony that no such plans were spelled out in public meetings as such.

MR. STONE: We tender the witness.

CROSS EXAMINATION

BY MR. RICHARDSON:

Q Your name is Harry Blake?

A That is correct.

Q And you style yourself Reverend Harry Blake; you are a minister. Is that correct?

A I am a minister; yes.

Q I believe you are also field secretary for the Southern Christian Leadership Conference.

MR. STONE: If Your Honor please, we object to that as being irrelevant and immaterial.

MR. RICHARDSON: If the Court please, this man is a paid employee of the Southern Christian Leadership Conference, and I believe the State is entitled to show what his occupation is, because counsel has endeavored to show that he is simply a minister and a full-time minister, and that is his sole occupation.

THE COURT: All right. I understood the question to be one merely directed toward membership in an organization.

MR. RICHARDSON: No. I said field secretary. He is a paid employee and draws checks signed by Martin Luther King, Jr.

THE COURT: All right.

MR. STONE: If Your Honor please, we submit that Southern Leadership Conference is not shown to have any connection at all with CORE, or with whether or not these defendants actually breached the peace. And, moreover, my question to him as to his profession was merely for the purpose of identification. And I think he has been sufficiently identified. And, unless the Court is going to permit me to ask him about all of his affiliations, whatever they may be, relevant or irrelevant, I feel that the

1 Court should, of course, sustain this objection.

2 THE COURT: You were permitted to ask him about his

3 employment. And, as I understand the question, that is the

4 sole purpose of this question that you asked the defendant

5 about employment. Is that correct?

6 MR. RICHARDSON: THAT IS THE purpose at this time, as

7 well as to test credibility, and as well as bias and prejudice.

8 He is on cross-examination.

9 THE COURT: I, then, must retract my ruling and over-

10 rule the objection.

11 MR. STONE: If Your Honor please, we wish to respect-

12 fully except to the Court's ruling and ask that a bill be reserved

13 on the basis that the question is irrelevant and immaterial and

14 has absolutely nothing to do with whether or not these defend-

15 ants are guilty of having disturbed the peace on the day that

16 they are alleged to have done it.

17 MR. RICHARDSON: May I state to the Court, it is also

18 for the purpose of showing the intent with which he accompanied

19 them down there as a part of the whole case.

20 THE COURT: I fail to see how his employment --

21 MR. RICHARDSON: (Interrupting) That is simply one

22 additional reason, if the Court please. I will develop that a

23 little later.

24 THE COURT: Well, I can't note it at this time. You

25 may proceed with your question about the employment.

26 BY MR. RICHARDSON:

27 Q Now, I believe, Reverend Blake, you have a church

28 where?

29 A Bethany, Louisiana.

30 Q And you also obtained funds, as I have stated -- and

tell me if it is correct.

A I am field secretary for the Southern Christian Leadership Conference, yes.

Q And you earn earnings in that capacity?

A I do.

Q Now, when you were brought to the Caddo Parish jail you came in the jail with the regular elevator just like everyone else. Is that correct?

A I suppose it was regular; yes.

Q And you were in company of Captain D'Artois of the Caddo Parish sheriff's department, and Lieutenant Pittman and Major Coles Thomas, who is a Shreveport Police officer, and police Chief Teasley, and I believe a United States Marshal was there also. Do you recall that?

A That was at the arrest, not in the jail.

Q I mean coming up in the elevator to the jail.

A No, I don't recall.

Q Do you recall being in company with Captain D'Artois?

A I do.

Q And Lieutenant Pittman?

A I suppose; yes.

Q Who testified the other day?

A Yes.

Q Major Coles Thomas?

A Yes.

Q And Chief of police, Harvey Teasley?

A I don't know whether Chief Teasley was on the elevator or not.

Q And, then, a deputy marshal was there when you went upstairs. Is that correct?

A I don't know that. I suppose so.

Q There were other people in the elevator, were there not?

A I suppose so.

Q Now, then, do you recall at seven-twenty a. m. on August 4, 1961, the day that you were arrested up in the jail, having a conference with Major Bryant of the sheriff's department and Captain D'Artois of the Sheriff's department?

A I recall being interrogated by them.

Q Do you recall being present with them when there was conversation between you and them? Is that correct?

A I do recall.

Q Did you at that time state to them that David James Dennis called you at four o'clock that morning, and that was the first you knew of this incident, and that you were working on some papers for your church and that Dennis had agreed to help you print some bulletins after the two of you carried these people to the bus station, and that you agreed to go with them? Is that correct?

A I recall stating to him that Dennis called me.

Q At four o'clock in the morning?

A Around four o'clock; yes.

Q And that you were working on church papers?

A And that I was working on church papers and Dennis had agreed to work with me after I had gone to the bus station, or carried them to the bus station.

Q Did you agree with Dennis then to go with him to the bus station?

A Yes; to drive, yes.

Q Beg pardon?

A To drive to the bus station; yes.

1 Q And did you state to those two officers that was the
2 first you knew of this particular matter coming up that morning?
3 A The first that I knew of the particular matter?
4 Q Yes, that they were going to go that day?
5 A Yes, that is the first that I knew of the persons
6 going at that time; yes. That is what I was telling him, stating --
7 Q (Interrupting) Did you at that time and place tell
8 them that you did not use or furnish your car for use or bring
9 it over to David Dennis' house?
10 A No, I did not.
11 Q Did you subsequently on that same day about nine-ten
12 in the morning tell those same two officers that you did drive
13 your automobile over to Dennis' house that morning, so that it
14 could be used in case there was a larger number of people to go
15 to the bus station for this incident? Did you do that?
16 A No. I told them that I was furnishing my car to pro-
17 vide passengers -- provide transportation for persons to go to
18 the bus station. I told them that, as you said, seven-twenty
19 and nine, whatever the other hour, I told him at both times; yes.
20 Q Well, there were only two conferences or interrogations
21 or interviews that morning between you on the one hand and those
22 two officers on the other hand. Is that correct?
23 A I suppose it was. I was carried from room to room
24 any number of times. So I don't remember whether there was two
25 or more. I do know it was at least two.
26 Q Did you state to those two men at that time and place
27 at nine-ten a. m. in the parish jail on August 4th that it was
28 common knowledge, everybody knew there was going to be some
29 riders going to the bus station that morning?
30 A No, I did not.

Q You did not state that?

A No, I did not.

Q Did you tell them at that time and place at the first conference that morning that you didn't know anything about this incident until David James Dennis called you that morning? Is that correct?

A Yes, sir. I stated a few minutes ago that I told them that I did not know anything about any time the persons, the riders, were going to the bus station until Dennis called me about the hours.

Q Well, do you mean by that that you knew that they were going that morning, but you didn't know what hour or what bus they were going to catch? Is that what you mean?

A Beg your pardon?

MR. RICHARDSON: READ HIM the question.

(Whereupon, the pending question was read by the reporter as hereinabove recorded.)

THE WITNESS: I knew that Dennis and I were supposed to work.

BY MR. RICHARDSON:

Q Supposed to work?

A Yes.

Q Doing what?

A Work together, as I said, on some curch stencils. And when he called me I was going to provide my car for transportation for those persons to get to the bus station.

Q All right. Now, Reverend Blake, I have asked you twice. I will ask you one more time. Was that the first that you knew that they were going to go down there that morning?

A I knew that these persons were going to Jackson,

Mississippi. Now, whether they were going in the white room or what room they were going in --

Q (Interrupting) Well, I will ask you one more time. Did you not tell Captain D'Artois and Major Bryant in the jail on the first conference that morning that you didn't know anything about this incident coming up this morning of August 4th until David James Dennis called you at four o'clock in the morning?

A That Captain D'Artois asked me whether or not I was in on the plans. I told him no, I did not know that. I was not on their planning. I had not attended any planning meetings. I had attended public meetings. I did state that it was common knowledge that freedom riders were coming into Shreveport, that is maybe what he told you or has in the record there, trying to quote what I said.

Q Reverend Blake, you have testified a number of places. You have been in court. You know what I am asking you.

MR. STONE: Now, if Your Honor please, we object to that. What he has testified in other courts about and that sort of thing is not relevant here. It has no bearing at all. It just has no legal relevancy to any question that the prosecutor may be asking now.

MR. RICHARDSON: Your Honor, I have asked him four times and he still has evaded answering the question. I simply want to know, and I am only asking this witness was four o'clock in the morning the first time that he knew that these people were going to the bus station, if he told that to the officers that morning.

MR. STONE: If Your Honor please, I think that the defendant has answered the question at least four times if he has

1 asked four times. He has said in effect that that is the first
2 time that he knew that these defendants were going to the bus
3 station.
4 MR. RICHARDSON: Now, if that will be his answer, that
5 is what I want, Your Honor.
6 BY MR. RICHARDSON:
7 Q Is that your answer?
8 A Yes.
9 Q That is your answer; that is the first you knew?
10 A I didn't know that these defendants -- I knew that
11 persons were going to the bus station at that time, yes.
12 Q Now, then, my next question is, Harry Blake, whether
13 or not at the second conference with those officers you did not
14 tell them that you had met with Dennis the day before and had
15 agreed to take these people to the bus station the next morning.
16 A I told him -- he asked me had I met with Dennis, had
17 I ever had a conversation with Dennis. He asked me had Dennis
18 been to my house. I told him yes, Dennis had been to my house.
19 We had talked about freedom riders, and I did not tell him that
20 I had agreed the previous day to take any persons down.
21 Q All right. Let me ask you this question. You have
22 heard all the testimony because you have been here all during
23 the trial. Did you not hear the testimony of Major Bryant the
24 other day, and Captain D'Artois' testimony by stipulation is the
25 same, to the effect that Dennis, David James Dennis, told them
26 that he went to your house on the day before this Friday, August
27 4th, to discuss this matter with you and ask you specifically to
28 accompany him the next morning to the bus station with these
29 people? Now, is that so, or is it not so?
30 A I heard, yes; I heard that. I heard that in the testimony.

Q You heard that in the testimony? Now, my question is was David James Dennis telling it correctly?

A Well, now, I can't say what David James Dennis said. I can say what the officers testified. I don't know whether they were telling it correct. I don't know whether David James Dennis told them that or not.

Q Well, you have heard what they said.

A I heard what they said, yes.

Q You heard what they quoted David James Dennis as saying?

A Yes.

Q Did that take place?

A No, it did not.

Q All right, then. David James Dennis, according to the officers, has not told exactly what took place. Is that your testimony?

A Well, according to the officers, David James Dennis did come to my house. That is true, yes; they made that statement.

Q The day before. That is true?

A That day before, yes, that is true.

Q All right. Onthat day before did you agree to accompany him the next morning and go to the bus station with him?

A No, I did not.

Q You did not do that?

A No.

Q But, the fact is you did in fact accompany them the next morning?

A When I was informed that they were going the next morning.

1 Q Harry Blake, when you and David James Dennis decided
2 not to use your car and the six of you came to the bus station
3 on August 4th, you came down the alley on the north side. That
4 is correct, is it not -- the side away from Fannin Street?
5 A Yes, that is.
6 Q And pulled in just parallel at the parking lot at the
7 rear of the bus station. Is that correct?
8 A That is correct.
9 Q And, then, you and David James Dennis remained in
10 Harry Bethune's car. Is that correct?
11 A That is correct.
12 Q That was Bethune's car. Is that correct, too?
13 A That is correct.
14 Q Then, you were not driving?
15 A No, I was not.
16 Q Had you driven Bethune's car at all that morning?
17 A No.
18 Q Then, when you left the bus station you left immediately
19 after the passengers got out, did you not?
20 A That is correct.
21 Q And you went down to Edwards Street and turned right.
22 Is that correct?
23 A I suppose so. I don't recall. I think so.
24 Q Then, you got to Fannin Street and turned right again?
25 A Yes, sir.
26 Q You were going to mail a letter?
27 A I had a letter to mail.
28 Q You were going to mail it at the Southwestern Electric
29 Company building?
30 A When we parked there I was going -- I had the letterin

1 my possession, and this was close to the Post Office, and I
2 could have walked to the mail box to mail it; yes.
3 Q Well, if you had come up Fannin Street and turned left
4 at Marshal in order to get to the Southwestern Electric Company,
5 and you were going to mail the letter, why did you not drive on
6 down the next block to the Post Office?
7 A MR. STONE: Now, hold it just a minute. If Your Honor
8 please, now, we object to that question on this basis. First of
9 all, all of the testimony in evidence indicates that David Blake,
10 not this man, was driving the car. And, of course, he is not
11 competent to say why the car came down this way, instead of
12 turning at some other place. We object to it on that basis.
13 THE COURT: That wasn't the question. The objection
14 is overruled.
15 BY MR. RICHARDSON:
16 Q Why was it that you didn't proceed on down to the Post
17 Office when you were already on Marshal traveling away from Fannin
18 in the direction of Texas Street, and the Post Office in Shreveport
19 is on the corner of Texas and Marshal. Why did you not proceed
20 on down Marshal, instead of turning left at the light company
21 to go away from the direction of the Post Office?
22 A Well, number one, I was not driving; secondly, the
23 purpose of the driving was not to mail the letter. I had a letter
24 in my possession that I was going to mail. He was not carrying
25 me to mail the letter.
26 Q I see. Then, you were actually going back to do your
27 church work. Is that correct?
28 A When we -- yes, after --
29 Q (Interrupting) All right. Then, when you got on
30 Marshal Street and you turned left on Travis Street, which would

1 head back toward Red River and Bossier Parish, that is not in
2 the direction of your church, is it?
3 A Well, I was -- Number one, I wasn't going to the
4 church to do the work; secondly, I was riding with Dennis, and I
5 had to return when he got ready.
6 Q But, your church, you said, was at Bethany, Louisiana.
7 A I was not going to do the work at the church.
8 Q Where were you going to do the work?
9 A At my house.
10 Q And that is on Abbie Street?
11 A That is correct.
12 Q And Abbie Street is in Allendale?
13 A In Lakeside.
14 Q In Lakeside? And Abbie Street and Lakeside are both
15 in exactly the opposite direction from which your car was headed
16 when you stopped and parked. Is that ccrrect?
17 A That is correct.
18 Q Now, when you stopped and parked about four or five
19 feet from the curb as indicated in the picture, you all could see
20 the front of the bus station from there, could you not?
21 A Yes, the bus station could be seen; yes.
22 Q As well as the loading area under the shed where the buses
23 depart; that likewise could be seen, could it not?
24 A I don't think it could be seen very good, because
25 there were so many police standing around, and it probably could
26 have. I don't remember whether the exact loading -- being able
27 to see who would get on the bus. There were a number of buses
28 in the dock.
29 Q You anticipated the effect of my question. My question
30 was, you could see the buses, though.

A I could see the buses and the bus station; yes.

Q How long had you all remained there looking across the parking lot at the buses and bus station before the officers came up?

A I don't know. I didn't check it.

Q Well, it was more than four or five minutes, wasn't it?

A Oh, yes.

Q Had you mailed your letter?

A No, I hadn't.

Q Had you gotten out of the car?

A No, I had not.

Q Had either one of you gotten out of the car?

A I had not.

Q Would you be willing, Reverend Blake, to tell us what was discussed in the car on the way to the bus station that morning as between you and any of these defendants? Would you be willing to do that?

MR. STONE: If Your Honor please, we object to that as being --

THE COURT: (Interrupting) Only for the reason that some of you might not have been here Friday in my mentioning this, this Court is not going to stop to maintain order. If it is necessary for the sheriff to call you to order one more time this court room, or part of it, will be cleared. We don't intend to interrupt the proceedings in order to maintain order.

Proceed.

MR. STONE: If Your Honor please, I was about to make an objection, but I forgot.

THE COURT: There was a question about a conversation

between this defendant and the other defendants, one of the other defendants.

MR. STONE: I was going to object to it as being irrelevant and immaterial.

THE COURT: Overruled.

BY MR. RICHARDSON:

Q Would you tell us what was the conversation between you and the other passengers in the car that went to the bus station on the morning of August 4, 1961?

A Well, to be perfectly frank, I don't recall having a conversation. We were generally talking, as fellows would talk. I didn't know the young ladies. I was introduced to them.

Q You didn't know either Deloris or Marie McGinnie?

A No, I didn't know them.

Q Did you know they were down at the bus station when an incident like this occurred a few weeks ago?

A There were a number of persons down there, and the paper did not state their names.

Q I understand that. But, did you know they were there?

A I learned that when somebody testified last week.

Q You didn't know them before this morning?

A Yes, I knew them before this morning. I say I learned it when somebody testified last week.

Q You must have misunderstood me. I say, you did not know these two defendants, Deloris and Marie McGinnie, before the morning you all went to the bus station August 4th?

A No, I didn't.

Q What was the plans and what was the conversation in the car coming down that morning as between these defendants that you heard?

A Well, I don't know what their plans were.

Q I am asking you what their conversation was.

A You are asking me what their conversation was, and I stated that it was general conversation as far as I was concerned with the fellows. I didn't know the young ladies. No plans were discussed in the car, to my knowledge, and if they were, they didn't concern me, and I don't recall what they were.

Q Would you be willing to state what was said?

A I don't know what was said. Any number of things were said. We had a good distance to drive.

Q Well, will you tell us what you do remember that was said?

A I don't remember anything specifically.

MR. RICHARDSON: The witness is tendered.

REDIRECT EXAMINATION

BY MR. STONE:

Q Reverend Blake, I understood you to say in answer to a question of the prosecutor a minute ago that when Dave Dennis, David Dennis called you on the morning that this incident allegedly took place, that that was the first time you knew the persons were going at that time. Going where? Where did you mean?

A I think I stated, I intended to, that they were going to Jackson, Mississippi.

Q And you agreed at that time, I believe you said, to provide a car to help take the people to the bus station.

A That is true.

Q Did you know what was supposed to take place, if anything, at the bus station?

A I knew that they were supposed to catch the bus at the bus station.

1 Q You didn't know which waiting -- did you know which
2 waiting room they were supposed to use or anything of that sort?
3 A Well, this was not discussed as to what waiting room.
4 I guess they knew what waiting room.
5 Q But, you didn't know. Is that it?
6 A No.
7 Q The prosecutor asked you a question a minute ago con-
8 cerning your looking across the parking lot. Do you recall what
9 parking lot he was talking about?
10 A Well, it is a parking lot between the Beck Building
11 and the Southwestern Electric Company.
12 Q I will ask you if you did any particular or any special
13 looking across that parking lot for any reason?
14 A Yes, certainly. There were a massive number of officers
15 around, and I was looking at them.
16 Q Enough to arouse your curiosity?
17 A Certainly so.
18 Q And you watched them across the lot?
19 A I did.
20 MR. STONE: We tender the witness.
21 MR. RICHARDSON: We have no other questions.
22 (Witness excused.)
23 HAROLD BETHUNE
24 defendant, called as a witness on his own behalf, after being
25 first duly sworn, testified as follows:
26 DIRECT EXAMINATION
27 BY MR. STONE:
28 Q Will you tell the Court your name, please, and your
29 address?
30 A Reverend Harold Bethune, II, 1740 Oakdale Street,

Shreveport, Louisiana.

Q Reverend Bethune, at any time have you ever been convicted of any crime or offense?

A Yes. November, 1949, unauthorized use of a motor vehicle, sentenced sixty days in the parish jail.

Q What parish was that?

A Orleans Parish.

Q How long have you lived in Caddo Parish?

A Approximately continuous residence two years; off and on, ten years.

Q How old are you?

A Thirty-four.

Q Reverend Bethune, do you recall the morning of your arrest?

A Yes.

Q Will you tell the Court if you know Reverend Harry Blake?

A Yes. I have preached for him several times.

Q Did Reverend Blake have anything to do with any plans that you and Deloris McGinnie, Levert Taylor, and Marie McGinnie made or may have made to go to Jackson, Mississippi?

A No, not to my knowledge.

Q Did he have anything to do with any action that you did at the bus station in Shreveport or that any of these other defendants as far as you know did at the bus station?

A No one knew exactly what would happen that morning, with the exception of --

Q (Interrupting) That is not what I asked you. I asked you did Reverend Blake, to your knowledge, know anything about this.

A No, sir.

Q On the way down to the bus station in the car did you

1 discuss your plans?

2 A No.

3 Q Do you recall what you talked about, if anything, on

4 the way down to the bus station?

5 A The condition of the automobile.

6 Q The condition?

7 A Its brake shoes, the switch cutting off, and just

8 laughing about the condition of the car. That is all.

9 Q And you and Marie McGinnie and Deloris McGinnie and

10 Levert Taylor ride in an automobile with Reverend Blake and

11 Mr. Dennis to the bus station on the morning that you were

12 arrested?

13 A Yes, we did.

14 Q What was your purpose for going to the bus station,

15 if you had any?

16 A To catch the east-bound bus for Jackson, Mississippi.

17 Q Did each of you have tickets?

18 A Yes, we did.

19 Q For Jackson, Mississippi?

20 A That is right.

21 Q Tickets that were valid; were the tickets valid at

22 that time?

23 A Yes. They had just been purchased a few days before.

24 Q From the Continental Trailways Bus Station?

25 A That is right.

26 Q In the City of Shreveport, Louisiana?

27 A That is right.

28 Q Each of you had such a ticket?

29 A That is right.

30 Q Did you prior to your arrest have any knowledge of

any telephone call having been made to the police officials in reference to your intended use of the bus?

A No.

Q When was the first time that you learned about a telephone call having been made?

A In court.

Q Did you learn in court who made that call? Do you recall? I will withdraw the question. That is the first time you said you learned of that call. Now, what happened when you got to the bus station?

A The car was parked. I got out of the car and gave instructions to the driver to return the car to my pastor, Reverend C. F. Robinson. And then, helped the young ladies out of the car. We then moved to the bus station to find out the departure time of our bus. We started to the second door, which is the entrance to the white waiting room on the west side. Standing there were two patrolmen. And the tallest one, Badge No. 107, stopped me, and I told him where I was going. He said, "The colored waiting room is over there." I said, "I am not looking for the colored waiting room. I am an interstate passenger, and I would like to use this one.

Q Why did you want to use that waiting room?

A The other one was crowded. And he said, "If you go through this door you will be arrested." I said, "I would like to use this waiting room, please. He stepped aside, and let us in. I opened the door for Deloris and Marie. Levert held the door for me. And as I proceeded toward the desk to get the travel information I was stopped by Chief Teasley, who identified himself and asked what was our business there. I told him we were catching a bus to Jackson, Mississippi, and we wanted to

1 find out the travel time from the desk. He said, "You can find
2 out from the colored waiting room on the other side. I said,
3 "I would like to find out from here."
4 Q Just a minute. Was the same lady, as far as you
5 know, or the same clerk, lady or man, giving the information on
6 both sides?
7 A That is right. There were two in the booth.
8 Q Would it have been physically possible for you to
9 have gotten that information from the side where you were, if
10 the police had not interfered with you?
11 A On the side where I was?
12 Q Yes.
13 A In the white waiting room?
14 Q Yes.
15 A I believe I could have gotten the information had I
16 not been stopped.
17 Q Then, what happened?
18 A Then, he said, when I told him I wanted to get the
19 information here in the waiting room I was in, he said that,
20 "You can get the information from the colored side." I said,
21 "I am an interstate passenger, and I would like to find out from
22 the lady on this side. He said, 'Do you realize that you are
23 violating -- do you realize that if you disobey my order to leave
24 that you are violating the state and local statutes?" I told
25 him I was there in regards to the Interstate Commerce Commission
26 ruling that entitled me to the use of all facilities in the bus
27 terminal.
28 Q What did he say then?
29 A He said, "Well, are you going to leave?" And I said,
30 "I want to get the information to catch my bus." He said, "Well,

if you don't leave I will arrest you." I said, "I don't have any alternative."

Q Did the chief of police say anything specifically to anyone else in the group?

A Yes. When he first said, "You can get the information from the colored waiting room on the other side Marie McGinnie began to move to get the information from the bus station on this side because his address was personal to me.

Q What did the chief say or do at that time?

A He restrained and just said, "Just a minute, girl. Don't go any further."

Q Did he catch her and pull her back?

A Yes, he did.

Q And she came back?

A Yes, she did.

MR. STONE: We tender the witness.

CROSS EXAMINATION

BY MR. RICHARDSON:

Q Harold Bethune, when did you buy your ticket to go to Jackson on August 4th?

A I decided to go to Jackson Monday and sent the money by Dave Dennis to purchase a ticket for me sometime between Tuesday and Wednesday. I didn't see him that day, because I worked.

Q You heard the testimony the other day that Dave Dennis said he bought two tickets on Wednesday, and three on Thursday?

A Yes.

Q And you also heard the testimony that Levert Taylor said that he bought his own ticket. Is that correct, or do you know?

A I don't know. I know that I couldn't get to the bus station Tuesday or Wednesday, and I did want that ticket for the weekend to go to Jackson. So I sent Dave for my ticket.

Q Well, then, you had David Dennis buy your ticket and you knew that he was buying the ticket for you. Is that correct?

A Correct.

Q And did you give him money for just one ticket or for four or for five?

A I gave him money for my ticket.

Q Did you give him money at any time for anybody else's ticket?

A I couldn't use but one ticket.

Q Well, I just asked the question. You said he bought five. You didn't provide the money for the others?

A No, sir.

Q You have testified a moment ago that you told Officer Meecham on the outside and also Chief of Police Teasley on the inside that you were interstate passengers.

A Correct.

Q And by that you mean you were going from one state to another state?

A That is right.

Q Now, you have traveled on the bus a number of times, have you not?

A Yes, I have.

Q And when you got out of the car you got out adjacent to the alley on the north side of the bus station. Is that correct?

A That is right.

Q And when you walked to enter the bus station you walked

1 right past the interstate waiting room, did you not?

2 A I walked past the colored waiting room; yes.

3 Q But, also it has a sign that said, "Interstate passen-

4 gers".

5 A I didn't read the sign.

6 Q You know now that it is an interstate passenger waiting

7 room, don't you?

8 A I know it is a colored waiting room.

9 Q You know it is also an interstate waiting room, do you

10 not?

11 A I couldn't be positive. I would have to go down

12 there and see.

13 Q When you got down to where Officer Meecham was you

14 told him you were an interstate passenger, did you not?

15 A That is right.

16 Q He pointed out to you the interstate passenger waiting room,

17 did he not?

18 A No. He pointed out the colored waiting room.

19 Q But, he pointed out the one that you now know is the

20 interstate passenger waiting room.

21 A He pointed to the colored waiting room; yes, sir.

22 Q Then, when you went inside and talked to Chief Teasley

23 you told him you were an interstate passenger, did you not?

24 A That is right.

25 Q And he directed you where that waiting room was?

26 A To the colored waiting room; yes.

27 Q How many times did he ask you to move on that you can

28 recall?

29 A He instructed me to go to the colored waiting room

30 twice; to leave the white waiting room once.

1 Q Well, now, Harold Bethune, I know what you have said.
2 You also heard yesterday or Friday what Chief Teasley said.
3 A Yes, sir.
4 Q You heard Chief Teasley testify that he did not use
5 the word "colored waiting room". You heard him say that, did
6 you not?
7 A Yes, sir, I heard him say that.
8 Q Now, my question is simply this: When you now say
9 "colored waiting room" this morning, you are talking about the
10 waiting room on the north side. Is that correct?
11 A I am talking about the waiting room Chief Teasley sent
12 me to.
13 Q But, he did not use the word "colored waiting room"
14 did he?
15 A Yes, sir, he did, sir.
16 Q You say that he did?
17 A That is correct.
18 Q Now, you said a moment ago in answer to defense counsel's
19 question that you did not know what would happen that morning.
20 What did you mean by that?
21 A I don't remember the question.
22 Q You remember the answer, don't you?
23 A No.
24 Q You don't remember the answer at all?
25 A No.
26 Q He was asking you about plans when you got down to the
27 station, and you said you did not know what would happen that
28 morning.
29 A The plans were that we would leave for Jackson,
30 Mississippi, at the time of the departure time of the bus. We

1 were going to catch a bus. That was our plans, and to arrive
2 in Jackson, and to proceed with our business in Jackson.
3 Q But, you told him when he asked you those questions
4 that no one knew what would happen that morning. What did
5 you mean what would happen that morning?
6 A He asked was Reverend Blake -- thank you. I remember.
7 -- was Reverend Blake informed as to the plans for our leaving.
8 No one except members of the group knew we were going to leave
9 at all.
10 Q Reverend Blake, was he going to go, too?
11 A Reverend Blake did not know we were going to leave.
12 No one knew we were going to leave. I think Attorney Stone
13 pointed that out when he said that it was necessary for me to
14 say -- just answer the question did Reverend Blake know anything
15 about our plans. He did not. No one knew what would happen
16 that morning.
17 Q Well, did you say awhile ago you were going to Jackson
18 to test some facilities over there?
19 A I was going to Jackson --
20 MR. STONE: (Interrupting) Hold on just a minute.
21 If Your Honor please, I was objecting to the question
22 as to what he was going to Mississippi for, as being irrelevant
23 and immaterial.
24 THE COURT: Sustained.
25 MR. RICHARDSON: If the Court please, I would like to
26 be heard on that, because we think that what he was going to
27 Jackson for shows whether or not he actually was making a bona
28 fide trip or whether he was not making a bona fide trip, whether
29 he actually intended to ride the bus that morning or not. There
30 has been testimony about five tickets, and four people show up.

There is testimony already in the record that they said, "Well, we didn't think we would be arrested here, because" they thought the Shreveport officers had seen the light. I think there is a question of whether or not they actually were making a a bona fide trip or not.

MR. STONE: Of course, if Your Honor please, there has been testimony that they went to the bus station. Pictures are in evidence that they had bags, overnight.

THE COURT: There has been no evidence introduced that would support the contention that they were not intending to ride the bus.

MR. RICHARDSON: Well, I may be able to develop it, Your Honor, if I can develop this question a little further. I will ask another question and withdraw this one.

THE COURT: All right.

BY MR. RICHARDSON:

Q Harold Bethune, I believe you had Five Dollars and three cents on you when you were arrested. Is that correct?

A That is right.

Q And one of the girls had no money?

A And a check book.

Q And one of the girls had no money. Is that correct?

A That is not correct.

Q One of the girls had Three Dollars. Is that correct?

A I don't know how much they all had.

Q How about the other riders, David James Dennis? He had Five Dollars. Is that correct? Ten Dollars.

A I don't know how much they had. I had Five Dollars and forty-eight cents and a check book, deposited Twenty-some-odd Dollars in the bank.

Q You were actually going to Jackson as an interstate passenger. Is that right?

A That is right.

Q Do you have relatives there? Do you have a place to stay there?

MR. STONE: Just a minute. If Your Honor please, whether he has relatives in Mississippi, whether he had a job in Mississippi, or if he was just going to Mississippi sightseeing, is irrelevant and it is immaterial. It has nothing to do with whether or not he breached the peace.

THE COURT: Whether he did intend to go to Mississippi is relevant. I believe that is the object of the question.

MR. STONE: But, if Your Honor please, the fact that he has relatives in Mississippi does not prove that he intended to go to Mississippi to see them. I have got relatives in Los Angeles, and if I could go to Los Angeles tomorrow, I might not see any of them. And it doesn't mean that I am going there to see them. And it doesn't mean that it has anything to do with whether or not, in fact, I actually planned to go.

MR. RICHARDSON: If the Court please, I believe I understand his objection, but I think it goes to the effect, rather than the admissibility. If these people left Shreveport and had bus tickets and four of them all together, two male and two female, they are not married, and they had about Twenty Dollars between them, amongst the four. I think the State is entitled to show that and to see whether or not they had relatives that they could stay with or see whether this was all a sham. We think we are entitled to make that showing. It goes to the effect, rather than the admissibility.

THE COURT: I believe the State is entitled to inquire

as to whether or not the trip was intended. That is the only reason for the admission of the evidence sought by this question. The objection is overruled.

MR. STONE: If Your Honor please, we wish to except to the ruling of the Court respectfully on the basis that whether the defendants had relatives in Mississippi or not, or whether they were going merely for pleasure or not, has nothing to do with their intent to go.

THE COURT: The purpose of their trip does not have anything to do with this case, but the intent to go does have something to do with this case.

MR. STONE: Yes, sir, but what we are saying is that this does not bear on their intent. The only way we feel that the State can show that they didn't intend to go to Mississippi is either to show that they intended to stay here or intended to go some place else, and the State isn't even attempting to show that.

THE COURT: The objection has been overruled.

BY MR. RICHARDSON:

Q Did you intend to go to Mississippi and stay there?

A That is correct.

MR. STONE: If Your Honor please, we are willing to stipulate that Harold Bethune, Levert Taylor, Marie McGinnie and Deloris McGinnie intended to go to Mississippi to test the segregation laws in reference to bus travel in interstate commerce, if that is what the prosecutor is driving at. We are willing to admit it.

THE COURT: I don't know that that is what the prosecutor is driving at. It may be that he is attempting to show that they did not intend to go to Jackson.

Does the stipulation satisfy the prosecution?

MR. RICHARDSON: That is not the purpose of my --

MR. STONE: (Interrupting) I think we are entitled to know what he is -- he says he is layinga foundation.

THE COURT: I think he has made it clear. If he hasn't, I have. Proceed.

BY MR. RICHARDSON:

Q Do you have people there with whom you were going to stay?

A I lived at Grambling College for four years with a Lamar Garr and family. Lamar Garr is employed in Jackson, Mississippi, as a school teacher.

Q Had you made arrangements to stay with him? Did he know that you were coming?

A It is not a matter of arrangement. I stop with fellow friends when I am traveling. I am a minister. I preach. And also I am a YMCA member. Accommodation was no problem in Jackson, no more than they were in Shreveport when I first came here.

Q But, the person whom you just mentioned did not know you were coming?

A Was he aware of my coming?

Q That is correct.

A He knew I would be there this summer one day.

Q Now, Harold Bethune, your counsel asked you about how many times you had been convicted of any kind of an offense by which you had to pay a fine or sentenced to serve some time. And the only one that you mentioned was sixty days in New Orleans, which you referred to as unauthorized use, I believe, of a car. Is that correct?

A That is the only one he asked me about; yes.

1 Q Well, I am just asking you the opportunity now to tell
2 us of any others of which you have been convicted or had to pay
3 any kind of fine, traffic or whatever it may be.
4 A Prior to 1959 I have had several; '49, I have had
5 several arrests.
6 Q Would you tell us what?
7 MR. STONE: Just a minute.
8 MR. RICHARDSON: I am not asking him about arrests.
9 BY MR. RICHARDSON:
10 Q Would you tell us what your convictions are?
11 A I am not aware. Possibly, if you will call them off
12 I can admit to them if they are there.
13 Q Well, we will do that.
14 A Go ahead.
15 Q Didn't you pay a $17.50 fine in Beaumont, Texas, one
16 time? You told the officers about that.
17 A Traffic tickets, yes, sir.
18 Q And another Ten Dollar fine in Beaumont, Texas.
19 MR. STONE: Just a minute. If Your Honor please, we
20 object to this as being irrelevant. His convictions are only
21 relevant if they are convictions of offenses that would affect
22 his truth and veracity. Convictions involving moral turpitude
23 or a question of character and a traffic conviction --
24 MR. RICHARDSON: (Interrupting) Excuse me just a
25 minute, counsel. The Code of Criminal Procedure specifically
26 provides --
27 THE COURT: (Interrupting) The witness has testified
28 that he had one previous conviction. Proceed.
29 BY MR. RICHARDSON:
30 Q Now, you had the $17.50 fine in Beaumont and the $10.00

fine in Beaumont?

A That is right.

Q And the sixty-day sentence that you mentioned in New Orleans.

A In New Orleans; that is right.

Q And you had a vagrancy conviction in New Orleans. Do you recall that?

A No, not as a conviction, because the attorney sent me home and he proceeded to handle the balance of whatever was out on that. I was sent home the same day I was to appear for it. The attorney was George Ragale.

Q But, it stands on the record as a conviction for vagrancy.

A It will.

Q Weren't you also convicted of petty larceny in New Orleans?

A No, sir.

Q In 1943?

A No, sir.

Q You are Harold Bethune?

A Yes, I am.

Q Were you in New Orleans on April 4, 1943? Do you know?

A Yes, sir, I was.

Q And the conviction of petty larceny of Harold Bethune on April 4, 1943, the Police Department of New Orleans, that is not you?

A I was in New Orleans charged with petty larceny, but, as far as a conviction is concerned, I have no knowledge of that.

Q Well, I show you a sheet and ask you to look at it, and you see where it says, "Police Department, New Orleans,

1 Louisiana, Harold Bethune,"on the sixty-day sentence that you
2 mentioned; you see that, do you not?
3 A That is '49. That is right.
4 Q Then, on the same sheet you see, "The Police Department
5 of New Orleans, Louisiana, Harold Bethune," the same number,
6 40269, the same number as 40269, for petty larceny? That is a
7 sentence.
8 A What is this?
9 Q That is a sentence.
10 A I was never sentenced for that charge.
11 Q But, that is your name, isn't it?
12 A That is my name.
13 Q And it has the same number as the one of the sixty-day
14 sentence.
15 A That is right.
16 Q You did remember the vagrancy, you said.
17 A Yes. I was arrested for vagrancy.
18 Q Now, when you went to the bus station this morning on
19 August 4th in this case, you went over to Dennis' house, did you
20 not?
21 A That is right.
22 Q And, then, you and the others came on to the station.
23 Dennis had already -- well, you picked up the two men, did you,
24 the other man, didn't you, Levert Taylor?
25 A Yes, sir. I picked up Levert.
26 Q You picked up Levert Taylor and then came to Dennis'
27 house? And the three of you then went and picked up the two
28 McGinnie girls?
29 A That is right.
30 Q Then, when you came back that is when you met Blake
at Dennis' house?

A That is right.

Q And Blake had already brought his car over there by the time you all got back?

A That is right.

Q Now, when you were brought to the parish jail in this case you had all four tickets, did you not?

A No, I didn't.

Q You didn't have the tickets of the other passengers?

A No, I didn't.

Q Did you have more than one ticket in your possession?

A No, I didn't.

Q You had only your own?

A That is right.

Q Didn't they give you a receipt for your effects up there?

A I picked up the tickets in the jail while we were being booked, turned them over to the gentleman who was writing down the names, had him record the tickets and placed in my personal effects.

Q Well, then, when you were booked in jail, then, you did turn in the four tickets to the jailer?

A I picked the tickets up and turned them in to the officers.

Q And you all had agreed that you would be the spokesman when you got to the bus station?

A No, we didn't. I was the first one they searched, and I decided it would be better to have those tickets in one place, and I had them recorded in one place.

Q But, you weren't searched at the bus station. You mean upstairs now?

A Upstairs.

Q I am talkingabout at the bus station when you all went down that morning you were the one who did all the talking insofar as the four colored people are concerned?

A Chief Teasley used the name Bethune, and that is me, and I am --

Q (Interrupting) You say you walked past the interstate waiting room because it was crowded?

A I waslked past the colored waiting room because it was crowded.

Q Well, you mean by that there were a number of people sitting in the seats?

A It was crowded. They were sitting in the seats and standing. It was congested more so than the court room is.

Q And it was impossible for you to go get the information there?

A I went to the most convenient waiting room where there was ample enough room, ample enough space and not so much business at the desk.

Q And you walked past the other waiting room to get to that one, did you not?

A That is right.

Q When did you first know that David James Dennis had called the police and the newspaper?

A I don't know that.

Q You hadn't discussed it with him that morning?

A No.

Q You don't know it yet?

A I still don't know it. That is right.

MR. RICHARDSON: The witness is tendered.

REDIRECT EXAMINATION

BY MR. STONE:

Q Did you hear Chief Teasley tell Marie McGinnie to move on? Did you hear him tell her anything at all?

A No. He didn't speak to her at all.

Q Did he speak to Deloris McGinnie?

A With the exception when he restrained Marie, he stopped her. That was the only time he spoke to her.

Q When Marie was trying to leave and he stopped her?

A Yes.

Q Did he say anything at all to Deloris McGinnie?

A Nothing at all.

Q Did he say anything at all to Levert Taylor, as far as you know?

A No.

Q And you were there all the time?

A Yes.

Q Did any other police officer, as far as you know, walk up and say anything to Deloris McGinnie?

A No.

Q Did any police officer, as far as -- and you were there with her all the time?

A That is right.

Q Did any police officer, as far as you know, walk up and say anything to Marie McGinnie, other than when Chief Teasley restrained her?

A No, no other than Chief Teasley.

Q And you were with her all the time?

A That is right.

Q Were you also with Levert Taylor all the time?

1 A That is right.

2 Q Did any police officer walk up and say anything to

3 Levert Taylor?

4 A No.

5 Q Did Chief Teasley say anything to Levert Taylor?

6 A No, he didn't.

7 Q Chief Teasley -- your testimony is that Chief Teasley

8 talked to you?

9 A That is right. He stopped me first.

10 Q Did you also testify that you had not beenselected

11 as spokesman for this group?

12 A That is right.

13 Q Did you assume to speak for this group?

14 A No, I did not.

15 Q With their consent?

16 A No, I did not.

17 Q All right. When you went up to the bus station you

18 saw -- did you see two waiting rooms?

19 A Yes, I did.

20 Q Did you see one that had, as far as you could tell,

21 only colored people in it?

22 A That is right. That was the first waiting room.

23 Q Did you see another one?

24 A The large one; yes.

25 Q Larger than the other one?

26 A Yes, it was.

27 Q And what kind of people, if at all, did it have in it?

28 A White, policemens, and passengers.

29 Q Did you know whether the ones in the white waiting

30 room were inter- or intrastate passengers? Could you tell?

A No, I did not.

Q Could you tell -- was there any way you could tell whether colored people in the colored waiting room were going --

A (Interrupting) No, I did not.

MR. STONE: We retender the witness.

RECROSS EXAMINATION

BY MR. RICHARDSON:

Q What is the name of your church?

A I am a member of the Hollywood Baptist Church. Reverend C. F. Robinson is the pastor. I am employed there on his request as an evangelist and superintendent of the South Highland Missions.

Q Well, do you have earnings there?

A No salary. Compensation is freewill offering. I preach. They leave an offering, and that is how I am paid.

THE COURT: DO YOU have any other employment?

THE WITNESS: At the present I am a salesman, advertising salesman.

THE COURT: Any other employment?

THE WITNESS: I sell direct selling, Bibles, pictures, door-to-door selling, appliances for Modern Sales & Service.

BY MR. RICHARDSON:

Q Where were you ordained?

A In New Orleans.

Q By what denomination?

A Baptist.

Q What was the name of the church or congregation?

A I can't hear you.

Q Were you ordained in a local congregation in New Orleans?

A I was ordained by the First District Baptist, Missionary Baptist Association.

Q That is what I want to know. How long ago?

A 1953 -- '54.

Q Have you had any regular or permanent church since you were ordained?

A Yes. I served Bryan Chapel down in Georgia while a student in Moorehouse College, graduate School of Religion. I served Graham College in Beaumont, Texas.

Q When was the last time you had a church full-time on a salary?

A The last time I served a church was in that Graham Congregational Christian Church about three years ago.

Q How long have you lived in Shreveport?

A Two years.

Q Where are you from originally?

A New Orleans.

MR. RICHARDSON: Witness retendered.

(Witness excused.)

MR. STONE: If Your Honor please, defense rests.

THE COURT: Any rebuttal?

MR. RICHARDSON: No rebuttal, if the Court please.

MR. STONE: If Your Honor please, the defendants waive argument, except to again urge that the evidence by both the defense and the State, if we take it literally to mean that these defendants went into the white waiting room, if we take it that way, that their presence there was unlawful, if the evidence be found to be that way, which we deny, then, of course, their arrest under this statute would be in violation of the 14th amendment, of the Constitution of the United States.

(Off the record discussion.)

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OPINION OF THE COURT

THE COURT: There is not a person in this court room who does not know that if white persons go into the colored waiting room in Shreveport or if colored persons go into the white waiting room at the bus station in Shreveport that a breach of the peace is likely and eminent and probable.

The police department and sheriff's department of this city and state are to be commended for taking prompt action. Other police and other cities and towns have been highly criticized in many places for failing to take action when such an incident as this was about to occur.

In this case the attempt, I think, to create a disturbance was planned and deliberate. Evidence uncontradicted shows that there were meetings at which these defendants perhaps with others planned this excursion, and that one of the defendants, Dennis, called the police and alerted them. He could have only had one of two purposes, or maybe both, for such a call. One was publicity, and the other was protection. He received the protection. I think the question here is not whether or not the police have the right or the authority to direct people who are doing something that is lawful to move on. The question here is purely whether or not these people congregated intending to provoke a breach of the peace, congregated with the intent to do something that was calculated to disturb the peace.

There is absolutely no question about it. The defense has admitted, or offered to admit from time to time that these colored people did go into the white waiting room at the bus station. The Court does not believe the testimony of Blake and Bethune when they say they did not know what was planned or what was about to happen or what was going to transpire.

I find Blake as a principal and we find all the defendants guilty.

Are you ready for sentence?

MR. STONE: No, sir. If Your Honor please, we first wish to reserve a bill to the verdict of the Court for reasons previously stated.

We would like to move for a new trial, and to move for or file a motion in arrest of judgment.

Now, I would ask leave at this time of the Court to file both of these motions in writing, if the Court is disposed to allow us this privilege. And we wish that the Court would delay sentencing until such time as we have had ample time within such delay as the Court fixes to file it.

THE COURT: We will allow you the time.

(Off the record discussion.)

THE COURT: All right. You are given until Wednesday morning.

(Off the record discussion.)

THE COURT: The defendants will be free on the same bond until Wednesday morning. They are directed to appear Wednesday morning at ten o'clock in this court.

(Whereupon, at 12:00 o'clock noon court was adjourned.)

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WEDNESDAY MORNING

AUGUST 23, 1961

10:00 O'CLOCK A. M.

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MR. STONE: If Your Honor please, the defendants in this case have each of them filed a joint motion for a new trial and a motion in arrest of judgment.

(Off the record discussion.)

THE COURT: The arguments on the motion in arrest of judgment and the motion for a new trial have either been presented to this Court during the trial of the case or prior to the trial to Judge O'Neal on the motion to quash and on the motion for a bill of particulars.

Nothing new is presented to the Court in these arguments. Consequently, the motion for a new trial and the motion for arrest of judgment is overruled.

MR. STONE: If Your Honor please, we wish to except to the rulings of the Court with reference to both of these motions on the bases as set forth in the motions, and, particularly, on the basis that the same is in violation of due process and equal protection clause of the Constitution of the United States, and ask that a bill be reserved.

THE COURT: All right.

Are the defendants ready for sentence.

MR. STONE: If Your Honor please, the defendants are at this time.

THE COURT: Bring them up.

I don't know that it would make any particular difference, but I think you should understand that these sentences are going to be imposed as I think the prosecution has been motivated

1 and the arrest has been motivated, not because of what you think
2 or the fact that your beliefs are different from the beliefs
3 of the white people generally in this area, and that, although
4 you certainly cannot separate this case from the segregation
5 problem, these sentences are motivated, I think, by a desire on
6 the part of the Court to do what it can to maintain the relatively
7 harmonious relationships in this community that have existed in
8 the past between the races and to prevent incidents in Shreveport
9 that can have hardly any other conclusion except the destruction
10 of the relatively harmonious relationships that have existed here.
11 The State has an obligation to the very existence of
12 government to protect the property and the persons of its citi-
13 zens. I believe that that was the principal motivation of the
14 police department and the principal motivation of the prosecu-
15 tion. And you are to understand that it is the principal motiva-
16 tion in these sentences.
17 The Court respects your right to believe as you wish
18 concerning anything you want to have a thought on and to take any
19 action under the law to promote the thing that you believe in,
20 but we do feel an obligation to take action in imposing these
21 sentences that are the only thing the Court has found to be
22 effective in preventing the recurrence of incidents that have
23 been found to be in violation of the criminal statutes.
24 The two girls in this case, Deloris McGinnie and Marie
25 McGinnie have no prior criminal record. They are local girls.
26 They are not girls from some place out of town sent in to agitate.
27 The statute provides for a maximum of Two Hundred Dollars fine
28 or four months imprisonment in jail or both. The Court doesn't
29 feel that the two girls have been active movers in these incidents,
30 although they were certainly present, and upon a repetition, they

could expect the same treatment before this Court that any repeater can expect; but, jail is more difficult for females than it is for males, and it is the Court's belief that females are sometimes led more easily to do things that the consequences of which they do not foresee, the consequences of violating the criminal statutes, the foreseeable consequences of jail.

I am not going to impose the maximum sentence on these two girls. The State has been put to considerable expense and will be put to considerable more expense before these trials are finally terminated. Consequently, a fine of One Hundred Fifty Dollars or thirty days will be levied against Deloris McGinnie and Marie McGinnie. A jail sentence of fifteen days will be enforced against each. The fifteen-day jail sentence will be suspended pending their behavior.

Levert Taylor, you are sentenced to pay a fine of a Hundred Fifty Dollars and cost, or thirty days, and thirty days in jail.

Harold Bethune is the oldest of the group in court.

This criminal record indicates that you fully realize the consequences of the violation of the criminal statutes. You have had experience with criminal law before, and the record indicates that you did what you did with your eyes open. It was intentional and planned.

Is there anything you wish to say before I impose sentence?

MR. STONE: If Your Honor please, I believe the Court referred to the incident involving the automobile as being theft. I would like to ask the Court if it is not correct that it is a charge of unauthorized use of automobile. I make mention of that because I believe the questionof theft involves the moral issue

that is not necessarily involved. Unauthorized use. And, since this man is a minister and this thing is likely to be published, if it is true that that is not correct, I wish the Court would please make the correction of that statement.

THE COURT: READING from FBI records, a copy of the FBI record, a Harold Bethune, the Charge appears in this record as Article 67 and 69, theft and possession of auto. And, as you know, 67 of the Criminal Code is the theft article. Article 69 is receiving stolen things. The disposition shown on the lines of this charge is sixty days P-P. I don't know what the P-P means, but there is nothing on the particular thing here --

MR. STONE: (Interrupting) Is His Honor suggesting that there is nothing on the record to show that he was actually convicted of theft or a lesser offense that might be involved?

THE COURT: There is nothing here, and the Court does recall testimony during the trial of the case that the conviction was for unauthorized use of a movable. At that time it might have been that the conviction was for a lesser included offense. That testimony and this record is the only information the Court has about the nature of the charge.

Is there anything you wish to say?

HAROLD BETHUNE: No.

THE COURT: You are sentenced to pay a fine of Two Hundred Dollars and cost or forty-five days, and three months in jail.

David Dennis, is there anything you wish to tell the Court before you are sentenced?

DAVID DENNIS: No.

THE COURT: David has no criminal record that I know of before 1960. In fact, there is no convictions that appear on

the criminal record, but I think the record shows -- the testimony shows that David Dennis is fully aware of the consequences of the violation of the criminal statutes, and that you were the mover and the promoter or at least one of them in this movement.

You are also sentenced to pay a fine of Two Hundred Dollars and cost or forty-five days, and three months in jail.

Harry Blake has been in court before with no conviction that the Court recalls except traffic violation.

You are occupied as a minister and have a church in the country?

HARRY BLAKE: I do.

THE COURT: The evidence attempted to show that Blake really didn't have knowledge of what was going on, but the Court was unable to believe the evidence that was produced for that purpose. There is some question in my mind about the role that Blake might have played in the leadership of the group. I don't think Blake's presence or absence or his participating in it or not would have made much difference to the others.

Consequently, the sentence won't be as great as the sentence levied on Bethune and David Dennis. You are sentenced to pay a fine of Two Hundred Dollars and costs, or forty-five days, and thirty days in jail.

MR. STONE: If Your Honor please, on behalf of each of these defendants, I wish to give notice at this time that they intend to apply, or that I intend to apply on behalf of each of them to the Supreme Court of the State of Louisiana for supervisory writs of review. I intend to ask for writs of mandamus, prohibition and certiorari, and such other writs that may be proper. I will, with leave of the Court, file in the record by tomorrow

morning written notice of this intention. And in view of this fact, and the statement by counsel, which I assure the Court is made in good faith, I wish to ask that these defendants, each of them, be granted a liberty on bail as may be fixed by this Court. I have prepared a memorandum of authorities, which I have not had a chance to read. That is, a final copy of it. I have read most of these authorities in support of our plea for bail and the right thereof, that is, to bail, if Your Honor please. I don't know that it appears there, but if not, I am sure that His Honor is fully cognizant of Rule 13 of the Supreme Court rules, that is, Supreme Court of the State of Louisiana, to the effect that the giving pf notice of intent to file such an application with the Supreme Court suspends the execution of the sentence.

THE COURT: Judgment is the word to use, isn't it?

MR. STONE: Well, I believe it says suspend. It may be the word judgment. I am not positive, but I feel that it has been interpreted to mean that whatever is the judgment and sentence of the Court that the same will be suspended until such time as the action is had on the application. I would like to point out further to the Court that the Constitution of the State of Louisiana and all of the jurisprudence under the appropriate section as set forth in that memorandum there -- I don't recall the section -- provide that bail shall not be excessive, that every person shall be entitled to bail, except in murder and capital cases or cases where -- in those cases, I believe, where, I believe, unless the presumption of guilt, and so forth, is great. And, of course, except in cases where a punishment at hard labor in excess of five years or five years or in excess thereof has been actually imposed. We submit that cases have held that in unappealable cases that the Court should grant

bail pending review unless, of course, it is the opinion of the Court that the notice given to the effect that the application will be lodged, in which the request is made for supervisory writs, was given in bad faith. I submit that there is no reason to believe that we will not do as I have suggested that we will in this case.

I would like further to point out to the Court that if, even in a murder case or even in a case where a man is sentenced to the penitentiary for five years or for less than five years, if the man has an absolute right to bail in a case like that, it should follow all the more so, as the Court, I believe, has so often said, that he would be entitled to bail in a matter such as this where the crime is not one of such magnitude, or the injury caused is not so great.

THE COURT: In the cases to which you refer, the condition is present wherein appeal lies.

MR. STONE: That is correct.

THE COURT: And there is no appeal from a misdemeanor case in Louisiana.

MR. STONE: If Your Honor please, of course, there is the exception, which this case does not fit into the exception, of course, the exception being where the fine is in excess of a certain amount and the jail term, if one. However, the case of State versus Hollinsworth, which is one of the cases that has stood in Louisiana since 1915, has held that the Court should -- it didn't say that the Court must, but that the Court should -- and that is a case tried in the Supreme Court of the State of Louisiana -- that the Court should in an unappealable case, which was a misdemeanor in that particular case, grant bail pending the consideration in the Supreme Court of the application for review,

1 except in cases where the Court feels that the notice given is
2 one that is given in bad faith. That case, as far as I have
3 been able to ascertain, is still the law in the State of Louisiana
4 today. And, in fact, prior to that time it was the law as far
5 back, I believe, as 1874. We have Sheppardized, and we cannot
6 find that it has ever been changed.
7 However, I must submit to the Court that in all fair-
8 ness that my examination perhaps has not been as exhaustive as
9 I would like for it to have been in order for me to come to the
10 Court and make that statement.
11 THE COURT: Of course, I doubt if the district attorney
12 is prepared to argue this matter, since this is one that has
13 been just presented to the Court. The memorandum hasn't even
14 been read by counsel for defense.
15 MR. RICHARDSON: That is correct, Your Honor. I know
16 of no authority for granting of bail, other than the discretion
17 of the Court. I know of no law that would allow it. If the
18 Court would like authority we can research and bring it in
19 Friday or Tuesday, the next court day as is convenient to the
20 Court.
21 THE COURT: I will be glad to read the provisions and
22 read the cases and authorities cited by the defense. Since
23 there are only a few of them I would be able to read them prob-
24 ably sometime this afternoon. Would you like for me to fix the
25 time for argument on this this afternoon?
26 MR. STONE: Yes, sir, if Your Honor please.
27 THE COURT: Suppose we fix it at about three o'clock
28 to argue this question of bail, pending the application for writs,
29 at three o'clock this afternoon. In the meantime the defendants
30 will be remanded to jail.

(Whereupon, court was adjourned until 3:00 p. m. of the same day.)

AFTER RECESS

THE COURT: This case is now on application for bail pending the writs. The notice has been given that the defendants intend to apply for writs to the Supreme Court. Do you want to argue?

MR. RICHARDSON: No, Your Honor. There is only that one case. I can't find where it is overruled. It didn't allow it in that case, in the Hollingsworth case.

THE COURT: In State against Hollingsworth in 1950 in the Louisiana Supreme Court held that in unappealable criminal cases the Court should grant bail pending the determination of the application for writs unless there was a question of the good faith of the parties in giving the notice to apply for writs.

The Court had thought that it would not grant bail in this case. It was not aware that the Hollingsworth case was on the books, but the case seems to be clear, and it has not been interpreted further by the Supreme Court. In the Hollingsworth case bail was actually ordered by the Supreme Court on an alternative writ of mandamus.

Consequently, the Court feels that it should under the law grant bail in this case. And I will fix bail pending the writs.

The defendant informed the Court that it would have his application for writs presented by when?

MR. STONE: If Your Honor please, quite frankly, I must confess that I don't know what I must send along with the application at this time. At any rate, I will have it -- must have it filed, according to my understanding of the law, within

ten days. I would like to have the full ten days within which to file this application, that is, ten days from this date. I can, perhaps, do it sooner if it is not required that I send a transcript of the record along with it. If it is required, I am almost certain that we will have to have about ten days, if His Honor is disposed to give it.

THE COURT: All right. The defendants are granted ten days in which to perfect the application for writs.

MR. STONE: If His Honor please, I don't mean to interrupt the Court. In fixing bail, would the Court please take into consideration the differences in the sentences imposed upon each of these defendants, and would the Court also consider the case of State versus Spring, cited 19 Southern 2nd, 147, which case stands for the proposition that the granting of bail and the fixing of bail that in doing so, the Court should take into consideration only the question of whether or not it is sufficient to insure the appearance or to assure the appearance of the defendants at that particular time.

THE COURT: The Court will do that. You don't need that.

The names of the defendants are the McGinnie girls, Dave Dennis, Bethune and Levert Taylor and Harry Blake.

Bond for Dave Dennis and Harold Bethune is fixed at Seven Hundred Fifty Dollars. The bond for Levert Taylor and Blake are fixed at Five Hundred Dollars each. For the two McGinnie girls, Three Hundred Dollars, each.

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(Whereupon, Court was adjourned.)

CERTIFICATE

I, Mrs. Laurine K. Brown, Official Court Reporter, First Judicial District Court, Parish of Caddo, State of Louisiana, do hereby certify that the above and foregoing 260 pages of typewritten matter constitute a true and correct report and transcript of the testimony and proceedings had on the trial of this cause at the time and place hereinbefore set out on page 1 hereof.

IN WITNESS WHEREOF I have hereunto affixed my signature at Shreveport, Louisiana, this the 8th day of September, 1961.

Laurine K. Brown
(Mrs.) Laurine K. Brown,
Official Court Reporter.

PUERTO RICO INC. VS. ARMAIZ, JUSTINO, Y. J.J. PUERTO RICO 1961

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1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 660

TEXACO PUERTO RICO INC.

Petitioner,

against

JUSTINO V. ARMAIZ and his wife JOAQUINA GONZALES, and MOBIL OIL CARIBE, INC.,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI

BRIEF FOR RESPONDENTS IN OPPOSITION

JAMES R. WITHROW, JR.,
2 Wall Street,
New York 5, N. Y.,

JOSE TRIAS MONGE,
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OF COUNSEL:

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SANFORD M. LITVACK.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 660

TEXACO PUERTO RICO INC.,
Petitioner,
against

JUSTINO V. ARMAIZ and his wife JOAQUINA GONZALES, and MOBIL OIL CARIBE, INC.,
Respondents.

ON PETITION FOR WRITS OF CERTIORARI

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinions below are printed as Appendices to the Petition:

Order of Superior Court of Puerto Rico, Bayamon Part ..... Appendix A

Judgment of Superior Court of Puerto Rico ..... Appendix B

Order of Supreme Court of Puerto Rico.... Appendix C

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1258. Its Petition, however, expressly recognizes that Section 1258 does not, by its provisions, authorize this Court to grant the requested writs of certiorari, but argues that this Section must be so interpreted as to permit such writs. This question of statutory

construction will arise, however, only if this Court concludes that the decisions sought to be reviewed involve controlling questions of federal laws. Section 1258 does not provide for review of the decisions of Puerto Rican courts on questions of local Puerto Rican law.

Agreed

Questions Presented

1. Whether an important and controlling question of federal law is presented by either:

not the basis of the decision below

(a) A judgment of a trial court in Puerto Rico dismissing a complaint for a plaintiff's willful failure to obey that court's order to answer interrogatories relevant to a question of illegality under local Puerto Rican law; or

held to be proper by a misreading of federal law

(b) A judgment of the Supreme Court of Puerto Rico denying a petition for review of the dismissal of the complaint for such willful failure to answer.

2. Whether a judgment entered by the Superior Court of Puerto Rico, which is not the Supreme Court of the Commonwealth of Puerto Rico, may be reviewed by this Court under 28 U.S.C. § 1258.

3. Whether an order of the Supreme Court of Puerto Rico, entered in its discretion pursuant to the Judicial Code of the Commonwealth of Puerto Rico (4 L.P.R. Ann. § 37(b)) denying a petition for review of a judgment may be reviewed by this Court under 28 U.S.C. § 1258.

Statutes Involved

The statutes and the Rules of Procedure pertinent to the Petition are printed in Appendix I hereto as follows:

Antitrust Laws of Puerto Rico, Sections 251 and 252 (10 L.P.R. Ann. §§ 251 and 252);

Judicial Code of Puerto Rico, Section 37(b) (4 L.P.R. Ann. § 37(b));

Judicial Code of the United States, Sections 1257, 1258, and 1293 (28 U.S.C. §§1257, 1258 and 1293);

Rules of Civil Procedure of Puerto Rico (1958), Rule 34.4.

Statement

The gist of the complaint is that defendant Mobil Oil Caribe, Inc. ("Mobil") induced defendants, Armaiz and his wife, to breach a contract with petitioner, Texaco Puerto Rico Inc. ("Texaco"). The complaint seeks an injunction, cancellation of a subsequent contract between Mobil and Armaiz and a judgment declaring petitioner's option to acquire the properties involved to be valid and enforceable. No claim is made for damages or for unjust enrichment.

The defendants denied substantially all of the allegations of the complaint and set up certain affirmative defenses[1] including the defense that the contract sought to be enforced by plaintiff, Texaco, was illegal and void as violating "the anti-trust and public order laws in force in the Commonwealth of Puerto Rico". As a further defense to the injunction, it was alleged that plaintiff had unclean hands and that to issue such a writ would perpetuate a violation of the antitrust laws in force in Puerto Rico.

Defendants also served interrogatories demanding disclosure of facts designed to support these defenses by showing the dominant share of the Puerto Rican market controlled by Texaco and the extent to which effective

1. The pertinent portions of defendants' affirmative defenses are printed as Appendix D to the Petition.

competition has been foreclosed in this local market by the contract sued on and by Texaco's system of restrictive contracts.

Texaco moved to strike the defendants' affirmative defenses and objected to the interrogatories on the grounds that they were improper in this suit for equitable relief.

After hearing, the Superior Court of Puerto Rico, Bayamon Part, on April 12, 1961, sustained the defendants' affirmative defenses as being sufficient under the local law of Puerto Rico, including the local antitrust statutes of Puerto Rico.[2] The court, applying Puerto Rican law in the interpretation of plaintiff's contract, said in its order,[3] that to enforce plaintiff's contract

> "* * * would have no other scope than to place in the hands of plaintiff the station of the Armaiz-Gonzales spouses, thereby increasing the *illegal control* over the gasoline market in Puerto Rico."

It then concluded:

> "* * * Therefore, the defenses that were challenged must not be stricken and the interrogatories presented by the defendants must be answered within 30 days."

Plaintiff sought to have this interlocutory order reviewed by the Supreme Court of Puerto Rico. Its petition was denied, thereby making the Superior Court's decision the law of the case prior to the trial on the merits.

Texaco failed to answer the interrogatories as ordered. Thereafter, the Superior Court gave Texaco "a final 20

2. 10 L.P.R. Ann. §§ 251 and 252. Printed in Appendix I hereto.
3. Printed as Appendix A to the Petition.

day term to answer * * * under pain of penalties." Plaintiff continued its refusal to answer and, on motion to compel answer or dismiss the complaint the Superior Court entered a judgment dismissing the complaint.[4]

Plaintiff's petition for a review of that judgment by the Supreme Court of Puerto Rico was denied.[5]

This Petition now seeks a writ of certiorari to review the judgment of the Superior Court and the denial by the Supreme Court of Puerto Rico.

ARGUMENT

I

The decision below rests squarely on Puerto Rican procedural and substantive law.

Rule 34.4 of the Rules of Civil Procedure of the Commonwealth of Puerto Rico, specifically provides for a judgment dismissing a complaint for failure to serve answers to interrogatories ordered by the court.[6] The Superior Court, having determined as a matter of law that it would not strike the affirmative defenses of the defendants, had no alternative but to dismiss the complaint in the light of the plaintiff's repeated refusals to comply with its orders. This dismissal has never been challenged by the petitioner as an abuse of discretion. But whether it involved an abuse of discretion or not, a determination of that question would involve the application of the Puerto Rican Rules of Civil Procedure, not any federal question.

4. Printed as Appendix B to the Petition.
5. Printed as Appendix C to the Petition.
6. Printed in Appendix I hereto.

Plaintiff sought review of this dismissal by the Supreme Court of Puerto Rico. As such review is discretionary,[7] plaintiff filed an extensive and detailed Petition for Review. It urged two errors of law:

> *First,* the denial of its motion to strike defendants' affirmative defenses and of its objections to the interrogatories, and
>
> *Second,* the dismissal of the complaint on the ground that plaintiff had refused to answer defendants' interrogatories.

That Petition for Review, conceded that the affirmative defenses challenged the validity of the contract sued upon by plaintiff on the ground "that the contract * * * is null *ab initio* because it violates the antitrust laws of the Commonwealth of Puerto Rico." By denying the Petition for Review the Supreme Court left undisturbed the trial court's decision that such defenses were proper under the local Puerto Rican antitrust statutes.

This was the second time that the Supreme Court of Puerto Rico had, in its discretion, left undisturbed the ruling of the Superior Court that the affirmative defenses were valid as a matter of law on a number of grounds, including the local Puerto Rican statutes. Thus, having just had these questions of law decided against it under local Puerto Rican procedure, plaintiff, in effect sought to have the "law of the case" reviewed again by the Supreme Court of Puerto Rico by the simple expedient of repeatedly disobeying the order of the trial court.

This having failed, plaintiff now petitions this Court for review. The possibilities of permitting a litigant to secure interminable re-examinations of questions of sub-

7. 4 L.P.R. Ann. 37(b). Printed in Appendix I hereto.

stantive law arising at the pleading stage of a case in connection with each step in discovery is repugnant to our entire judicial system and concepts of fair play. This is particularly true when the decision sought to be reviewed involves local court rulings on questions of local procedure and the sufficiency of defenses based on local law.

II

There is no important or controlling question of federal law.

Petitioner insists that, implicit in the judgment of the Superior Court and the denial of review by the Supreme Court of Puerto Rico, there lurks an important and controlling question of federal law. Strangely, when petitioner was trying to induce the Supreme Court of Puerto Rico to grant a discretionary review, petitioner specifically urged the importance of the question presented under the local Puerto Rican antitrust statutes. One must assume plaintiff realized that to obtain a reversal of the decision of the trial court, it had to convince the Supreme Court that the decision was an erroneous interpretation of Puerto Rican statutes.

Petitioner now claims, however, that the decision below is based solely on federal grounds (i.e. an application of the United States antitrust laws). This is directly *contra* to what the trial court said and what it did, since it refused to strike the defenses on a number of grounds, including the local Puerto Rican antitrust laws.

This Petition ignores the fact that the judgments sought to be reviewed were based on the dismissal of the complaint resulting from petitioner's contempt of an order

of the Superior Court. Instead, it seeks a review of the sufficiency of the affirmative defenses. These defenses are based not only on the United States antitrust laws but also on the local Puerto Rican antitrust statutes. These Puerto Rican statutes are separate and distinct from the United States antitrust laws. *Puerto Rico* v. *Shell Co.,* 302 U. S. 253 (1937). These defenses have been held by the Superior Court of Puerto Rico in this case to be sufficient as a matter of Puerto Rican substantive law under the local antitrust statutes. The defendants' interrogatories are, and have been held by that Puerto Rican court to be, plainly germane to these defenses. Thus, even assuming *arguendo* that the Superior Court misconstrued the application of the federal antitrust laws, nevertheless, since it also expressly relied on applicable Puerto Rican law, petitioner is not entitled to review by this Court. As this Court stated in *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 129 (1945):

> "* * * this court will not review a State court decision resting on an adequate and independent non-federal ground even though the State court may have also summoned to its support an erroneous view of federal law. 'Where the judgment of the state court rests on two grounds, one involving a federal question and the other not * * * and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.' *Lynch* v. *New York,* 293 U. S. 52, 54-55."

This principle is particularly applicable when, as here, the petitioner is seeking to thwart a broad application of the Puerto Rican antitrust laws which has been approved by the local courts of Puerto Rico. Even when the Judicial Code provided for review of questions of local Puerto Rican law, this Court consistently recognized the inter-

pretations of Puerto Rican law by the local courts of Puerto Rico as controlling. In *Bonet* v. *Texas Co.,* 308 U. S. 463, 471 (1940), this Court stated:

> "* * * To reverse a judgment of a Puerto Rican tribunal on such a local matter as the interpretation of an act of the local legislature, it would not be sufficient if we or the Circuit Court of Appeals merely disagreed with that interpretation. Nor would it be enough that the Puerto Rican tribunal chose what might seem, on appeal, to be the less reasonable of two possible interpretations. And such judgment of reversal would not be sustained here even though we felt that of several possible interpretations that of the Circuit Court of Appeals was the most reasonable one. For to justify reversal in such cases, the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous."

Despite this fundamental rule of law pronounced in *Bonet* v. *Texas,* petitioner seeks to rely on the specious argument that the federal courts would have construed the Puerto Rican antitrust laws so narrowly as to make this contract valid and enforceable in equity. Suffice it to say the Puerto Rican court on a motion directed to a pleading construed the Puerto Rican statute more broadly.[8] Such a judicial determination of local law must be controlling.

never made such a contention

8. The Superior Court held that the defendants were entitled to prove that the necessary effect of the equitable enforcement of the contract was to restrain trade and commerce in Puerto Rico. That court was certainly influenced by the fact that the contract actually was not what it purported to be on its face, i.e., a simple contract of borrow and loan. Indeed it was one where the provisions restraining the borrower were of the essence. It was these restraints which plaintiff was seeking to enforce, for as the court noted the defendants "have been willing to pay the loan in full, and plaintiff has refused." As a result the court gave the defendants the opportunity to defend against a suit for specific performance of this contract both by showing the restraint on competition by this contract standing alone and that this contract was but a part of plaintiff's system of long term contracts having similar restrictive provisions.

— what provision

— what provision

There was no contention that the contract, by itself, was illegal. Ind. directed if inf. is offer against. Might attack inf.

Show that decision was not based upon local law

Moreover, this is the first case where a court of the Commonwealth has considered affirmative defenses asserted under the local antitrust laws and therefore the local courts are entitled to consider this question on the record after a full trial and not solely upon the pleadings. Otherwise those local statutes cannot be adapted to promote competition in Puerto Rico. There is no reason why these local statutes must be equated to the federal antitrust laws. The courts of the Commonwealth must be permitted to determine the scope of its local antitrust statutes.

but the court did expressly

might argue

Actually all that the court below decided was that the defendants could at the trial of the case, show that plaintiff was not entitled to enforce the contract by equitable means and show that the contract was in furtherance of a monopolistic plan to restrain local competition in Puerto Rico. In effect, the court merely concluded that the efficacy of such affirmative defenses should be left for determination at the trial. Certainly such a decision involves no controlling problem of federal law.

Fed law is in effect in internal P.R. commerce

III

Petitioner seeks improperly to invoke the jurisdiction of this Court.

Petitioner is uncertain which judgment of the courts below this Court should review. Consequently it seeks certiorari, under Section 1258 of the Judicial Code, to the judgments of both the Superior Court and the Supreme Court of Puerto Rico. Under this Section the judgment of the Superior Court cannot be reviewed by this Court and, in this case, the judgment of the Supreme Court should not be reviewed.

A. Review of Judgment of the Superior Court of Puerto Rico.

Section 1258 of Title 28 of the United States Code[9] expressly provides that a petition for a writ of certiorari to this Court lies *only* from final judgments or decrees of the Supreme Court of the Commonwealth. This Section does not provide for the direct review of a judgment of the Superior Court of Puerto Rico. In this respect, Section 1258 is the same as Section 1293,[9] which it superseded. Under Section 1293 appeals to the Circuit Court of Appeals for the First Circuit were permitted only from judgments of the Supreme Court of Puerto Rico. Whenever the Supreme Court's action was to deny a petition for discretionary review the only question before the court of appeals was whether there had been an abuse of discretion. *International Basic Economy Corp.* v. *Blanco Lugo,* 267 F. 2d 263 (1st Cir. 1959).

Petitioner bases its request for a review of the Superior Court's judgment on the argument that Section 1258 does not mean what it expressly states. Indeed, petitioner seeks to have this Court completely rewrite this Section by substituting the words "by the highest court of Puerto Rico in which a decision could be had" for "by the Supreme Court of the Commonwealth of Puerto Rico." (Cf. 28 U. S. C. §1257[9]). To justify such a revision petitioner conjectures a "failure of Congress to recognize the effect * * *" of an amendment to the Judicial Code of Puerto Rico which, in a case such as this, made review discretionary. This amendment had been passed by the Legislature of Puerto Rico three years prior to the passage of Section 1258. (4 L.P.R. Ann. §37(b)).[10] Petitioner

9. §§1257, 1258 and 1293 are printed in Appendix I hereto.
10. Printed in Appendix I hereto.

offers no basis for its conjecture concerning such a "failure" by Congress. In fact, the Petition itself recites that this provision for discretionary review was referred to on various occasions during the course of Congressional Committee Hearings.

Furthermore, Congress was aware of the difference between Sections 1257 and 1258 for a number of reasons. It had before it the opinion of the Deputy Attorney General of the United States,[11] which stated that Section 1258 related only to review of final judgments or decrees of the Supreme Court of Puerto Rico and was not the equivalent of Section 1257. In addition, the Senate Committee considered whether the enactment of Section 1258 would add a further burden on this Court than already existed as a result of Section 1293. The Senate report concluded that it would not.[12]

Congress, being aware of the differences between Sections 1257 and 1258, determined that only judgments of the Supreme Court of the Commonwealth of Puerto Rico involving federal questions should be reviewed by this Court.[13]

---

11. Letter of Byron R. White, July 10, 1961 prior to the enactment of Section 1258. S. Rep. No. 735, 87th Cong. 1st Sess. pp. 3-4. Petitioner notes that this letter was attached to the Senate report sponsoring the bill. Yet, without any basis in fact petitioner now theorizes that "the letter apparently received scanty consideration." Needless to say, no such assumption is warranted.

12. S. Rep. No. 735, 87th Cong. 1st Sess. p. 3 (1961).

13. Congress has specifically provided for direct review by this Court of those rulings of the lower courts of Puerto Rico which it felt should be so reviewed. Thus 28 U.S.C. §1252 provides for such review in certain types of cases, but not in this case. With a special section in the Judicial Code for such direct review of lower court rulings, it seems clear that Congress never intended to provide for review by this Court of all the rulings of the lower courts of Puerto Rico when enacting Section 1258.

Not a ground for taking away the power of review

Despite the express wording of Section 1258 and the clear Congressional intent to the contrary, petitioner seeks an interpretation of this Section which would subject this Court to a myriad of cases seeking review of decisions of the trial courts of Puerto Rico relating to local discovery procedure. Such an interpretation would permit plaintiffs, in any case where a federal question is claimed, willfully to refuse to comply with orders of a trial court in Puerto Rico, to obtain a dismissal of the action and seek review by this Court.

B. Review of Judgment of the Supreme Court of Puerto Rico.

Petitioner also seeks review of the order of the Supreme Court of the Commonwealth of Puerto Rico denying the Petition for Review. The Petition to this Court discloses neither the basis upon which such review is sought nor precisely what petitioner would like this Court to review with respect to the order of the Supreme Court of the Commonwealth.

The Petition concedes that the Circuit Court of Appeals for the First Circuit has always held that an appeal from a judgment of the Supreme Court of Puerto Rico denying review is limited to a determination whether that court had abused its discretion in refusing to review.[14] Assuming, *arguendo,* that in granting or refusing a petition for review the Supreme Court of Puerto Rico exercises a reviewable discretion, it is difficult to see how an abuse of that discretion would be reviewable under Section 1258. At most, the only question that could be raised would be a question of Puerto Rican appellate procedure arising

14. Petition, p. 16.

Supreme Ct.'s — decision was not based upon exercise of discretion but upon erroneous view of fed. law.

Supreme Ct.'s discretion — is not question

under the Judicial Code of Puerto Rico. The Petition makes no claim of any abuse of discretion.

In refusing to grant plaintiff's Petition for Review, the Supreme Court of Puerto Rico was merely carrying out its established rule of law that discovery in the Superior Courts of Puerto Rico is solely within the discretion of those courts and will not be reviewed unless there has been an abuse of discretion. That court made its position abundantly clear in *Sierra* v. *Superior Court,* 81 P. R. Rep. 540 (1959). In that case the defendant's interrogatories were sustained by the Superior Court and the Supreme Court of Puerto Rico granted a writ of review. The court in upholding the trial court stated:

> "On appeal or review, our function is limited to deciding whether the Superior Court abused its discretion in rejecting those objections and ordering all the questions in the interrogatory to be answered. It is not up to us to determine the propriety of discovery as if we were a court of first instance. Although it is not beyond the ambit of review, unless it is shown that the lower court lacks a reasonable ground or hinders the substantial rights of a party, the judgment of the trial judge who presided the proceeding should prevail." (pp. 557-8).

Since plaintiff did not claim an abuse of discretion the Supreme Court of Puerto Rico followed the *Sierra* case and denied review. Such a discretionary denial of review is not a question which this Court should undertake to review.

Furthermore, this Court has in the past denied certiorari when it appeared that a denial of review by a

Sup. Ct. of P.R. could have rested the denial on

supreme court might have rested on non-federal grounds.[15] Actually there are at least four non-federal grounds on which the denial by the Supreme Court of Puerto Rico might have rested:

(1) an interpretation of the local Puerto Rican antitrust statutes;

(2) the defenses would, if proved, show that the plaintiff had unclean hands;

(3) a rule of local procedural law that the scope of discovery is within the control of the trial court, to be generally reviewed only after trial;[16] and

(4) plaintiff's contract and course of conduct were void as against the Public Order of Puerto Rico.

There being these alternative non-federal grounds, review should not be accorded to petitioner under Section 1258.

C. Plenary review is not warranted.

Petitioner's final argument is that this Court must rewrite Section 1258 or it will be deprived of "corrective power over erroneous adjudications of federal questions by inferior Puerto Rican courts, wherever the Puerto Rico Supreme Court had exercised its discretionary power" and denied review. To support this, petitioner argues that unless rewritten there can be no review by this Court of a constitutional question decided by the

were argued but the possibility exists

15. See *Stembridge* v. *Georgia,* 343 U. S. 541, 547 (1952), where this Court stated:

> "At this stage, the Supreme Court of Georgia could have denied certiorari on adequate state grounds. Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment."

16. *Sierra* v. *Superior Court,* 81 P.R. Rep. 540 (1959).

lower courts of Puerto Rico. This argument is unsound. There is an absolute right of appeal to the Supreme Court of Puerto Rico in cases involving constitutional questions,[17] and Section 1258 permits review of that court's judgment. Furthermore if the decision of the Puerto Rican court in this case had rested *solely* on questions of federal law, Section 1258 would permit review. However, in view of the non-federal grounds for decision there is no basis for review.

which one? Supreme

IV

Petitioner's arguments on the U. S. antitrust laws are not pertinent.

In view of the foregoing, we do not reach any problem under the antitrust laws of the United States. Petitioner's argument on this problem is in reality entirely synthetic and specious. Suffice it to say that in a case in equity a District Court of the United States would, we submit, have reached the same conclusion. This is a suit for an injunction, without any claim for damages or unjust enrichment, to enforce a contract which was one of the means employed to effect an unreasonable restraint of trade. On a motion to strike defendants' antitrust defenses, a district court would have assumed, as a matter of law, that the contract sought to be enforced by specific performance was an integral part of petitioner's plan for monopolization of trade and commerce and indeed, that enforcement thereof would entail a direct violation of Section 7 of the Clayton Act as well as Section 2 of the Sherman Act. It would, accordingly, have denied the motion to strike. The cases cited by petitioner are not

wrong

17. 4 L.P.R. Ann. §37(a).

in point because they involve efforts by a defendant who, having received benefits under an illegal contract, seeks to avoid paying the plaintiff for the value received. No such situation exists in this case.

CONCLUSION

The petitioner having failed to set forth any basis for review by this Court under Section 1258 of the Judicial Code, the Petition for Writs of Certiorari should be denied.

March 14, 1962

Respectfully submitted,

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APPENDIX I

Antitrust Laws of Puerto Rico, Sections 251 and 252 (10 L.P.R. Ann. §§251 and 252)

§*251. Contracts in restraint of trade*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade, commerce, business transactions, and lawful and free competition in a town, or among the several towns of Puerto Rico is hereby declared to be illegal. Every person who shall make any such contract or engage in any such conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both such punishments in the discretion of the court—Mar. 14, 1907, p. 328, §1, eff. May 1, 1907.

§*252. Monopolies; penalties*

Every person who shall monopolize or attempt to monopolize or combine or attempt to combine with any other person or persons to monopolize any part of the trade or commerce in any town of Puerto Rico or between the towns thereof shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding five thousand dollars, or by imprisonment, not exceeding one year, or by both such punishments, in the discretion of the court.—Mar. 14, 1907, p. 328, §2 eff. May 1, 1907.

Judicial Code of Puerto Rico, Section 37(b) (4 L.P.R. Ann. §37(b))

§*37. Review of Rulings of Court of First Instance*

(b) Any other final judgment of the Superior Court may, on request of the party aggrieved, be reviewable by

the Supreme Court, by way of certiorari issued at the discretion of the court. The filing of a petition for review shall stay all proceedings in the Superior Court with respect to the judgment or part thereof whose review is sought, or the questions comprised therein, until the Supreme Court shall decide the proceeding. However, the Superior Court may proceed with the suit as to any question involved therein not comprised in the review proceedings, and if the judgment on appeal provides for the sale of goods liable to loss or deterioration, the Superior Court may order that the same be sold and the proceeds of the sale be deposited therein until the Supreme Court shall decide the proceeding.

Judicial Code of the United States, Sections 1257, 1258 and 1293 (28 U.S.C. §§1257, 1258 and 1293)

§1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution,

treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

§1258. Supreme Court of Puerto Rico; appeal; certiorari

Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States. Added Pub. L. 87-189, §1, Aug. 30, 1961, 75 Stat. 417.

§1293. Final decisions of Puerto Rico and Hawaii Supreme Courts

(Repealed. Pub. L. 87-189, §3, Aug. 30, 1961, 75 Stat. 417)

The courts of appeals for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions

of the supreme courts of Puerto Rico and Hawaii, respectively in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs. June 25, 1948, c. 646, 62 Stat. 929.

Rules of Civil Procedure of Puerto Rico (1958), Rule 34.4.

Rule 34.4. Failure of party to attend or serve answers.

If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 30 after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

STATE OF TEXAS vs MCMILLAN, MARION E., et al., 1968

Box 43
Folder 18

Society of Wisconsin

Please Retain Original Order

FORM NO. 353-3 — CITATION

THE STATE OF TEXAS

TO

MARION ERNEST McMILLIAN, MATTHEW DONALD JOHNSON, EDWARD HARRIS, MICHAEL ARNOLD DODD, CARL BRANNON, JAY SUMNERS, BLAKE PIERRE, MARVIN I. LARE, RUTH JEFFERSON, and the STUDENT NON-VIOLENT COORDINATING COMMITTEE, together and in concert with others whose names are not known, but who are a part of the assembly now present in the offices of the TEXAS DEPARTMENT OF PUBLIC WELFARE, in Dallas, Texas, have entered into the offices of the Department of Public Welfare and remained therein after the conclusion of any ligitimate business that they may have had therein

MARION ERNEST McMILLIAN, MATTHEW DONALD JOHNSON, EDWARD HARRIS, MICHAEL ARNOLD DODD, CARL BRANNON, JAY SUMNERS, BLAKE PIERRE, MARVIN I. LARE, RUTH JEFFERSON, and the STUDENT NON-VIOLENT COORDINATING COMMITTEE, together and in concert with others whose names are not known, but who are a part of the assembly now present in the offices of the TEXAS DEPARTMENT OF PUBLIC WELFARE, in Dallas, Texas, have entered into the offices of the Department of Public Welfare and remained therein after the conclusion of any ligitimate business that they may have had therein

Given under my hand and the seal of said Court at office this the ..... day of Nov. 1968.

ATTEST: BILL SHAW
Clerk of the District Courts of Dallas County, Texas

By Tena Worth Deputy
Tena Worth

CITATION

No. 68-10305-H

STATE OF TEXAS, FOR AND IN BEHALF OF THE STATE DEPARTMENT OF PUBLIC WELFARE

vs.

MARION ERNEST McMILLIAN, ET AL

ISSUED

This 26 day of Nov. 19 68

BILL SHAW,
Clerk, District Courts,
Dallas County, Texas.

By Tena Worth Deputy

CRAWFORD C. MARTIN, NOLA WHITE, HAWTHORNE PHILLIPS, ROBERT C. FLOWERS and MONROE CLAYTON, Assistant Attorney Generals
Box "R" Capitol Station
Austin, Texas 78711 GR5-3281

Atty. for Plaintiff

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DEPUTY

NO. 68-10305-H

STATE OF TEXAS, FOR AND IN BEHALF OF THE STATE DEPARTMENT OF PUBLIC WELFARE	X	IN THE DISTRICT COURT OF
V.	X	DALLAS COUNTY, TEXAS
MARION ERNEST McMILLIAN, ET AL	X	_____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION FOR INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the State of Texas, by and through its Attorney General, bringing this Petition for Injunction for and in behalf of the State Department of Public Welfare as Plaintiff, complaining of Marion Ernest McMillian, Matthew Donald Johnson, Edward Harris, Michael Arnold Dodd, Carl Brannon, Jay Sumners, Blake Pierre, Marvin I. Lare, Ruth Jefferson, and other persons whose names are not immediately known to Plaintiff but whose activities are hereinafter more fully described, and the Student Non-Violent Coordinating Committee, believed to be an association of persons, which individuals reside in and said association conduct activities in the City of Dallas, Dallas County, Texas, insofar as Plaintiff is able to determine. Plaintiff is a state agency existing under and by virtue of the Constitution and Statutes of the State of Texas.

1. The Plaintiff is an agency of the State of Texas and is operating according to the laws of the State of Texas, and has been so operating at all times hereinafter mentioned. Such agency will hereinafter be referred to as the "Department." The Department maintains its principle office in the City of Austin, Travis County, Texas; however, it maintains local offices in various

cities throughout the state in order to properly conduct its business. One of such offices is located in the City of Dallas, Dallas County, Texas, at 3306 Main Street in said city. The primary and paramount function of the Department is to render aid and assistance to certain needy and under-privileged citizens of this state.

2. That on or about 3:00 P.M. on November 25, 1968, the said Marion Ernest McMillian, together with the other defendants, and others whose names are not immediately known to Plaintiff, entered said offices of Plaintiff at the above described location at 3306 Main Street in the City of Dallas, Dallas County, Texas, with the apparent intention of registering protests concerning the operation, procedures and benefits administered by said office; that after registering their complaints and protests the said Marion Ernest McMillian did manifest his intention to remain upon the said premises after normal working hours and did encourage others to remain there with him, and over the objection of Plaintiff. Defendants Marion Ernest McMillian, Matthew Donald Johnson, Edward Harris and Michael Arnold Dodd are believed to be members of the the Student Non-Violent Coordinating Committee and that in such capacity and individually have manifest an intent to, and have, disrupted the normal functions and activities of this local office of Plaintiff, together with Defendants Carl Brannon, Jay Sumners, Blake Pierre, Marvin I. Lare, and others whose names are not immediately known to Plaintiff.

3. The Defendants have, in fact, interfered with the normal course of business and prevented the employees of Plaintiff from performing the normal duties and functions of their office. That Plaintiff is in process of moving said office and attempting to carry on the normal functions of the same;

however, the actions of Defendants in remaining on said premises and in failing and refusing to leave said premises have attempted to, and have, intimidated, harassed, and otherwise interfered with the normal activities of said office wherein their actions constitute a public nuisance and threaten injury to the public at large.

The presence of the Defendants at said office has disrupted and continues to disrupt the normal course of business and legal activities of the Department and unless restrained they are reasonably calculated to become further disruptive, all of which creates a public nuisance that threatens injury to the public at large; that all of such Defendants have so obstructed and interfered with the operation and activities of the Department that it was forced to and did temporarily discontinue the operation of its business activities. That Plaintiff has no adequate remedy at law for all of the acts of the herein Defendants.

Wherefore, these premises considered, Plaintiff prays that the Court grant a Temporary Restraining Order, compelling Defendants, and each of them, to remove themselves from the above described premises of the Plaintiff and restrain Defendants, and each of them, from entering and trespassing upon the premises usually controlled by the Department at any time, and from becoming involved in any activities which would interfere with the normal course of business of the Department and from intimidating, harassing, or otherwise interfering with the normal duties and functions of the employees of said Department, and from preventing the orderly conduct of business at said location together with the moving of said location as hereinabove described, and that such Temporary Restraining Order immediately issue without notice to the Defendants because of the irreparable injury being suffered by Plaintiffs and without an adequate remedy of law. That such Temporary Restraining Order exist in full force and effect until a

hearing can be held herein at a time not later than ten (10) days from the issuance thereof; and that legal process issue and be served upon Defendants and each of them as provided by law; that upon said hearing for temporary injunction the same be granted to continue in force and effect until final hearing on the merits, at which time judgment shall be granted making the temporary injunction, together with all of its terms and provisions, final and perpetual against said Defendants, and each of them. Plaintiff prays that because it is an agency of the State bond is not required of it that all the above process be issued without bond. Plaintiff prays for such other and further relief and orders that the Court may deem proper.

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant Attorney General

HAWTHORNE PHILLIPS
Staff Legal Assistant

ROBERT C. FLOWERS
Assistant Attorney General

MONROE CLAYTON
Assistant Attorney General

Attorneys for Plaintiff

Box "R" Capitol Station
Austin, Texas 78711
GR5-3281

STATE OF TEXAS)
)
COUNTY OF TRAVIS)

BEFORE ME, the undersigned authority, on this day personally appeared Burton Hackney, who being by me duly sworn, upon his oath did state that he is Commissioner of the State Department of Public Welfare that he is duly qualified and authorized to make this affidavit and is fully cognizant of the facts set out in the above and foregoing Petition for Injunction and that the facts therein contained are true and correct.

Burton Hackney
Burton Hackney

SUBSCRIBED AND SWORN to before me by the said Burton Hackney this the 26th day of November, 1968, to certify of which witness my hand and seal of office.

Bessie H. Janicek Bessie H. Janicek
Notary Public in and for Travis County, Texas

#60 welfare

On November 25 a group of Black Welfare Mothers began a protest at the Dallas Department of Public Welfare. The spokeman for the group was Mrs. Ruth Jefferson. The Dallas Chapter of SNCC sat in strong support of the Welfare Mothers. At 5:00 PM the welfare bldg. closed and the protestors were asked to leave but refused. Mrs. Jefferson along with the rest of the mothers stated that they would not leave until their demands were met. Those demands being:

— fell drawn up at end of lunch

legislature

can appoint advisory bds 1/3 bus, 1/3 county 1/3 recipient 16 regional bds

1. $100 per month, per child — not possible under Tex Const. Art 1 § 3
2. Increase of welfare board members to include a majority of black welfare recipients, not less than 51%
3. Increase number of black caseworkers on staff —
4. Adequate facilites of welfare department waiting room
5. Adequate aid station in welfare bldg. for old people and children
6. A special 'winter grant' of $50 minimum per child for winter clothing
7. Welfare manual for all recipients — send N.J. manual
8. A formal letter preceeding any cut of recipients checks —
9. Copy of the receipients budget
10. Committee made up of welfare recipients to examine all workers hired within a given district.

move out into old school with more space

Texas has 3 times as many caseworkers as average

welfare hrs to do caseaides

H. Schock out

send N.J. manual

No money in this

to try to set up a recipients

NO. 68-10305-H

TEXAS DEPARTMENT OF PUBLIC WELFARE	X	IN THE DISTRICT COURT FOR
V.	X	DALLAS COUNTY, TEXAS
MARION ERNEST McMILLIAN, ET AL	X	160th JUDICIAL DISTRICT

FIAT

On this the 26th day of November, the verified petition of the Department of Public Welfare, acting by and through the Attorney General of The State of Texas, having been presented to me in the chambers and it appearing from the facts set out in said verified petition that the Defendants named therein, these being as follows: Marion Ernest McMillian, Matthew Donald Johnson, Edward Harris, Michael Arnold Dodd, Carl Brannon, Jay Sumners, Blake Pierre, Marvin I. Lare, Ruth Jefferson, and the Student Non-Violent Coordinating Committee, together and in concert with others whose names are not known, but who are a part of the assembly now present in the offices of the Texas Department of Public Welfare, in Dallas, Texas, have entered into the offices of the Department of Public Welfare and remained therein after the conclusion of any legitimate business that they may have had therein; that the named Defendants have further refused to leave said premises and have been occupying the premises used by the said Department of Public Welfare for a period of approximately twenty-four hours and threatened to continue to remain in and occupy the offices of the Department of Public Welfare thereby preventing its employees from carrying out their usual tasks and duties in connection with the work of said agency; that it further appears to this court that Plaintiff is entitled to a Temporary Restraining Order without notice restraining and prohibiting the named defendants

and those now associated with them in occupying the offices of the Texas Department of Public Welfare from remaining in the offices of the Texas Department of Public Welfare and from interferring with any employee of the said Texas Department of Public Welfare in the conduct of the business of said agency and the performance of the normal duties of employment by each employee thereof; that unless such Temporary Restraining Order is granted without notice irreparable injury and harm will be suffered by the Department of Public Welfare and those recipients of state aid that it now serves as said Department and its employees will be unable to carry out their normal duties.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that a Temporary Restraining Order shall be issued by the Clerk of this Court directing that Marion Ernest McMillian, Matthew Donald Johnson, Edward Harris, Michael Arnold Dodd, Carl Brannon, Jay Sumners, Blake Pierre, Marvin I. Lare, Ruth Jefferson, and the Student Non-Violent Coordinating Committee, Defendants herein, together with all those individuals not named but who are present as a part of the assembly in the offices of the Department of Public Welfare and who are given actual notice of this restraining order are hereby restrained from further remaining in any of the offices in Dallas County, Texas, occupied by the Texas Department of Public Welfare, its agents, servants or employees and are ordered to vacate such offices immediately and not return unless such individual is a recipient of aid from said Department of Public Welfare and has legitimate business in connection with his or her own case or is an agent who is authorized in writing to represent a recipient of aid, or is applying for aid but such person shall be entitled to remain only during such period of times he or she is actually giving information and conducting business regarding such case; provided further, however, that such

business shall be conducted by those present without delay and that upon the conclusion of such legitimate business with the Department of Public Welfare, said person shall forthwith leave the offices of said Department of Public Welfare; that Defendants and those persons having actual knowledge of this restraining order are restrained and ordered not to obstruct or interfere with in any manner the ingress or egress of any agent, servant or employee of the Texas Department of Public Welfare or any member of the public having business therewith or in any manner prevent the employees, agents or servants of the Department of Public Welfare from carrying out his normal duties; that this restraining order shall be effective until the 5th day of December, 1968, at 9:00 a at which time Defendants shall appear and show cause why a temporary injunction should not issue under the same terms and conditions as these set out in this order.

SIGNED AND ENTERED, this the 26 day of November, 1968, at 7:20 o'clock P.M.

Lee Brown Walker
JUDGE PRESIDING

Judge 162nd Judicial District Court Sitting for Judge 160th Judicial District Court, Dallas County Texas.

NO. 68-10305-11

STATE OF TEXAS, FOR AND	(	
IN BEHALF OF THE STATE DEPARTMENT OF PUBLIC WELFARE	(	IN THE DISTRICT COURT OF
	(	DALLAS COUNTY, TEXAS
VS.	(	160TH JUDICIAL DISTRICT
MARION ERNEST McMILLIAN, ET AL	(	

RESPONDENT'S MOTION TO QUASH PETITIONER'S

ORIGINAL PETITION FOR INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, Marion Ernest McMillian, et al, hereinafter called respondents and move to strike petitioner's original petition for a temporary restraining order and injunction for the following good and sufficient reasons:

I.

Petitioner by and through its agents, servants and employees had notice that the undersigned attorneys did at all times pertinent to this matter represent all the named respondents herein and petitioner did not notify said attorneys about the proposed action of petitioner so that respondents could offer evidence as to why petitioner's petition should be denied.

II.

Petitioner by and through its agents, servants and employees had notice of the whereabouts of all named respondents during all times pertinent to this matter and did not notify said respondents of the proposed action of petitioner so that respondents could offer evidence as to why petitioner's petition should be denied.

III.

Petitioner's petition does not any where state any defined "irreparable injury" that any action of respondents caused as is required by Rule 680, Texas Rules of Criminal Procedure, to entitle petitioner to a temporary restraining order without notice.

IV.

Petitioner's petition does not any where state how any action of respondents caused "irreparable injury" that would entitle petitioner to a temporary restraining order without notice as is required by Rule 680, T.R.C.P.

V.

Respondents, by virtue of the Bill of Rights of the Constitution of the State of Texas, Section 27, have an absolute right of assembly in a peaceable manner to petition for redress of grievances; and such right is not subject to injunction or temporary restraining order.

VI.

Respondents have, by virtue of the First Amendment to the Constitution of the United States of America, an absolute right peaceably to assemble and to petition the government for a redress of grievances and such is not subject to injunction or temporary restraining order.

VII.

This Court's order does not anywhere state why the order was granted without notice as is required by Rule 680, T.R.C.P.

VIII.

"The verification of a petition for injunction must be direct and in such positive terms that it would sustain a charge of perjury if the verification should prove false." (Rule 680, T.R.C.P.)

JOHNSON v. FERGUSON, 55 SW2d, 153

IX.

Respondents would show the Court that petitioner's petition for injunction was verified by one, BURTON HACKNEY, who is the Commissioner of the State Department of Public Welfare, who, on his oath did state that he.. ....."is fully cognizant of the facts" and that said "facts are true and correct." Respondent would show the Court that Burton Hackney resides in Austin, Texas, and that he has not been in, at, or around the premises of the State Department of Public Welfare at its local offices, 3306 Main Street in

Dallas, Dallas County, Texas for the period of time beginning at "3:00 P.M. on November 25, 1968, and ending at the time the injunction was served on respondents herein. Said Burton Hackney therefore, could not possibly have had personal knowledge of the facts set out in this injunction and to which he swore were true and correct. The only way such information could have been obtained by Burton Hackney therefore, is by conversation with unnamed third parties. Said information is thus hearsay and insufficient to support a verified petition for injunction as required by Rule 680, T.R.C.P.

X.

Respondent is prepared to introduce evidence to show that patently erroneous statements of fact are alleged in petitioner's verified petition, to wit:

> "That on or about 3:00 P.M. on November 25, 1968, the said Marion Ernest McMillian (sic), together with the other defendants, and others whose names are not immediately known to Plaintiff, entered said offices of Plaintiff "
>
> Respondent would show this Court that Marion Ernest McMillan, together with the other respondents, and others whose names are not immediately known to Plaintiff entered the offices of Plaintiff on or about 8:30 A.M. on November 25, 1968. That after registering their complaints and protests the said Marion Ernest McMillan did manifest his intention to remain upon the said premises after normal working hours and did encourage others to remain there with him.
>
> Respondent would show the Court and is prepared to introduce sworn testimony in support thereof, that respondents remaining upon the premises of petitioner was <u>not</u> over the objection of petitioner, but to the contrary; respondents were <u>invited</u> by petitioner to remain upon the premises and that after a conference with respondents agents and employees, the Dallas Chief of Police, Charles Batchelor stated in a televised interview that respondents were to be the guests of the petitioner for the night of November 25, 1968. Respondents would further show that

following this time they were never asked to leave the premises by petitioner.

"Defendants Marion Ernest McMillian, Matthew Donald Johnson, Edward Harris and Michael Arnold Dodd are believed to be members of the Student Non-Violent Co-ordinating Committee and that in such capacity and individually have manifest an intent to, and have, disrupted the normal functions and activities of this local office of Plaintiff, together with Defendants Carl Brannon, Jay Sumners, Blake Pierre, Marvin I. Lare, and others whose names are not immediately known to Plaintiff"

Respondents would show the Court and are prepared to introduce sworn testimony in support thereof, that there was no disruption of the normal functions and activities of the petitioner's local office caused by respondents. The only disruption of the normal functions and activities of petitioner's local office was caused by petitioner's Commissioner, Burton Hackney, who illegally closed said office at the request of the Dallas City Attorney, Alex Bickley, on the basis of a false, irresponsible and malicious statement.

"The Defendants have, in fact, interfered with the normal course of business and prevented the employees of plaintiff from performing the normal duties and functions of their office."

Respondents would show the Court that, and are prepared to introduce sworn testimony in support thereof, the above statement is false.

"That plaintiff is in process of moving said office and attempting to carry on the normal functions of the same; however, the actions of defendants in remaining on said premises and in failing and refusing to leave said premises.."

Respondents assume that petitioner has alleged that its moving process and the carrying out of its normal functions have been interfered with by respondents. Respondents would show the Court and is prepared to introduce sworn testimony in support thereof that the above mentioned activities have been carried out in a normal manner save for petitioner's own illegal action mentioned above herein.

"That Defendants.....have attempted to, and have, intimidated, harassed, and otherwise interfered with the normal activities of said office wherein their actions constitute a public nuisance and threaten injury to the public at large."

Respondents would show that there is no evidence whatsoever to support the above allegation.

"The presence of the Defendants at said office has disrupted and continues to disrupt the normal course of business and legal activities of the Department and unless restrained they are reasonably calculated to become further disruptive, all of which creates a public nuisance that threatens injury to the public at large."

Respondents would show that there is no evidence whatsoever to support the above allegation.

".....that all of such Defendants have so obstructed and interfered with the operation and activities of the Department that it was forced to and did temporarily discontinue the operation of its business activities. That Plaintiff has no adequate remedy at law for all of the acts of the herein Defendants."

Respondents would show the Court and is prepared to introduce sworn testimony from Senator Oscar Mauzy, that petitioners' business activities were temporarily discontinued not because any act of respondents, but because of Petitioner Burton Hackney's

own illegal act in closing down its offices at the request of Dallas City Attorney, Alex Bickley, on the basis of a cruel, false, irresponsible and malicious statement by said Alex Bickley.

Respondents contend that under the authority of Carroll vs. President and Commissioners of Princess Anne, 37 Law Week 4041 (November 19, 1968) the ex parte character of the proceedings resulting in the restraining order operated to deny Respondents their First Amendment rights guaranteed to them against state incroachment by the Fourteenth Amendment. In Carroll, officials of a Maryland town obtained an injunction against a white supremist rally on public (county) property. The persons desiring to hold the rally were not notified of the hudicial proceedings which resulted in the injunction, and did not attend. The evidence disclosed no reason why they had not been notified. The Court in Carroll said in part:

> We need not decide the thorny problem of whether on the facts of this case, an injunction against the announced rally could be justified. The 10-day order here must be set aside because of a basic infirmity in the procedure by which it was obtained. It was issued ex parte, without notice to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings. There is a place in our jurisprudence for ex parte issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate .
>
> We do not here challenge the principle that there are special, limited circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guaranty of the First Amendment. In Cantwell v. Connecticut, 310 U.S. 296, at 308 (1939) this Court said that " No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to roit", See also Chaplinsky v. New-Hampshire, 315 U.S. 568, 572 (1942); Milkwagon Drivers Union v. Meadowmoor Daries, 312 U.S. 287, 294 (1941). Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speek has been so grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement.
>
> The Court has emphasized that "[a] system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity". Banton Books v. Sullivan, 372 U.S. 58, 70 (1963); Freedman v. Maryland, 380 U.S. 51, 57 (1965). And even where this presumption might otherwise be overcome, the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit. As the Court said in Freedman v. Maryland, supra, at 58, a noncriminal process of prior

restrainst upon expression, "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system".

Measured against these standards it is clear that the 10-day restraining order in the present case, issued ex parte without formal or informal notice to the petitioners or any effort to advise them of the proceedings cannot be sustained.

The pertinent facts in the instant case are wholly analagous to those in Carroll. Here, Respondents exercised their right of freedom of speech and assembly to gather in an orderly fashion in the waiting room of a public building, the Dallas County office of the Texas State Welfare Department, for the purpose of presenting their grievances. Respondents were in fact invited by petitioner to remain in the waiting room of the aforesaid public building and were never thereafter asked to leave prior to the serving of notice of the restraining order. Under these circumstances, it is submitted that there is no legally relevant distinction between Respondent's speech and assembly and that of the white supremists in Carroll. (The Court in Carroll made clear that the protected or unprotected nature of conduct under the First and Fourteenth Amendments is not relevant where prior restraint in the form of a restraining order is involved, stating that unprotected conduct can adequately be dealt with by subsequent punishment.)

Further in the instant case, as in Carroll there was no reason for not notifiying Respondents of the judicial hearing which resulted in issuance of the restraining order. As previously noted, the Texas State Officials who sought the restraining order were obviously aware of the location of respondents and of the identity and location of respondents' attorney. Nothing could have been simpler than to give respondents and/or their attorney notice of the hearing on the Motion for restraining order; yet, no effort was made to give such notice.

The restraining order in the instant case clearly is a prior restraint on respondents' future rights to assemble and speak in a public place, the Dallas office of the Texas State Welfare Department. In the Court's words as set out in Carroll, such a restraining order, " issued ex parte, without formal or informal notice to the petitioners (respondents) or any effort to advise them of the proceeding, cannot be sustained."

It appears that petitioners petition was heard in chambers, rather than in public hearing in the courtroom, so that defendants can't fairly reply to any contention of petitioner, since no record was preserved. (Contrary to Rule 330e-T.R.C.P.)

WHEREFORE, premises considered Respondents pray that this Court quash the temporary restraining order previously ordered and for stay enforcement and attachment on such other order pending a hearing in this motion to quash.

Ed Polk

Ed Polk

David J. Cardish

David J. Cardish

Douglas Larson

Douglas Larson

ATTORNEYS FOR RESPONDENTS

Dallas Legal Services Project
301 North Market Street
Dallas, Texas
RI-2-1631

STATE OF TEXAS

COUNTY OF DALLAS

BEFORE ME, the undersigned authority, on this day personally appeared Ed J. Polk, who being by me duly sworn, upon his oath did state that he is the Attorney for Defendants that he is duly qualified and authorized to make this affidavit and is fully cognizant of the facts set out in the above and foregoing Petition for Injunction and that the facts therein contained are true and correct to the best of his KNOWLEDGE and belief.

Ed J. Polk

ED J. POLK

DALLAS LEGAL SERVICES PROJECT
301 North Market Street
Dallas, Texas 75202 RI 2-1631

SUBSCRIBED AND SWORN to before me by the said Ed J. Polk this the 27th day of November, 1968, to certify of which witness my hand and seal of office.

Ella Jewel Hamlet

ELLA JEWEL HAMLET, NOTARY PUBLIC
in and for DALLAS COUNTY, TEXAS

Form 322 - TEMPORARY RESTRAINING ORDER

THE STATE OF TEXAS

TO

MARION ERNEST McMILLIAN, MATTHEW DONALD JOHNSON, EDWARD HARRIS, MICHAEL ARNOLD DODD, CARL BRANNON, JAY SUMNERS, BLAKE PIERRE, MARVIN I. LARE, RUTH JEFFERSON, and the STUDENT NON-VIOLENT COORDINATING COMMITTEE, together and in concert with others whose names are not known, but who are a part of the assembly now present in the offices of the TEXAS DEPARTMENT OF PUBLIC WELFARE, in Dallas, Texas, have entered into the offices of the Department of Public Welfare and remained therein after the conclusion of any ligitimate business that they may have had therein

prayed for and obtained from the Hon. DEE BROWN WALKER

Sitting for the Judge of the 160th Judicial District Court

Judge of the 162nd Judicial District, his most gracious TEMPORARY RESTRAINING ORDER and the said

(NO BOND REQUIRED)

having given bond, as required by the fiat of the judge of the 162nd Judicial District Court.

Now, Therefore, you, the said (as above stated)

your Counselors, Solicitors, Attorneys, Agents, Servants and employees are hereby commanded to DESIST and

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that

a Temporary Restraining Order shall be issued by the Clerk of this Court directing that Marion Ernest McMillian, Matthew Donald Johnson, Edward Harris, Michael Arnold Dodd, Carl Brannon, Jay Sumners, Blake Pierre, Marvin I. Lare, Ruth Jefferson, and the Student Non-Violent Coordinating Committee, Defendants herein, together with all those individuals not named but who are present as a part of the assembly in the offices of the Department of Public Welfare and who are given actual notice of this restraining order are hereby restrained from further remaining in any of the offices in Dallas County, Texas, occupied by the Texas Department of Public Welfare, its agents, servants or employees and are ordered to vacate such offices immediately and not return unless such individual is a recipient of aid from said Department of Public Welfare and has legitimate business in connection with his or her own case or is an agent who is authorized in writing to represent a recipient of aid, or is applying for aid but such person shall be entitled to remain only during such period of times he or she is actually giving information and conducting business re-

is actually giving information and conducting business regarding such case; provided further, however, that such business shall be conducted by those present without de. and that upon the conclusion of such legitimate business with the Department of Public Welfare, said person shall forthwith leave the offices of said Department of Public Welfare; that Defendants and those persons having actual knowledge of this restraining order are restrained and ordered not to obstruct or interfere with in any manner the ingress or egress of any agent, servant or employee of the Texas Department of Public Welfare or any member of the public having business therewith or in any manner prevent the employees, agents or servants of the Department of Public Welfare from carrying out his normal duties; that this restraining order shall be effective until the _____ day of December, 1968, at which time Defendants shall appear and show cause why a temporary injunction should not issue under the same terms and conditions as these set out in this order.

EXTRA EDITION

The United States
LAW WEEK

Supreme Court
Opinions

November 19, 1968 • THE BUREAU OF NATIONAL AFFAIRS, INC., WASHINGTON, D.C. • Volume 37, No. 19

OPINION ANNOUNCED NOVEMBER 19, 1968

The Supreme Court decided:

CIVIL RIGHTS – Freedom of Assembly

Failure to show why notice of hearing was not given vitiates Maryland 10 day ex parte injunction against Eastern Shore rally by white supremacist group during period of racial tension since adversary proceeding would have tended to assure protection of First Amendment rights; availability of hearing on two days notice does not save injunction; sponsors' attempts to continue rallies and effect on local officials of Maryland Court of Appeals decision upholding injunction saves case from being moot. (Carroll v. President and Commissioners of Princess Anne, No. 6) . . . . . page 4041

Full Text of Opinion

No. 6.—October Term, 1968.

Joseph Carroll et al., Petitioners, v. President and Commissioners of Princess Anne et al. } On Writ of Certiorari to the Court of Appeals of Maryland.

[November 19, 1968.]

Mr. Justice Fortas delivered the opinion of the Court.

Petitioners are identified with a "white supremacist" organization called the National States Rights Party. They held a public assembly or rally near the courthouse steps in the town of Princess Anne, the county seat of Somerset County, Maryland, in the evening of August 6, 1966. The authorities did not attempt to interfere with the rally. Because of the tense atmosphere which developed as the meeting progressed, about 60 state policemen were brought in, including some from a nearby county. They were held in readiness, but for tactical reasons only a few were in evidence at the scene of the rally.

Petitioners' speeches, amplified by a public address system so that they could be heard for several blocks, were aggressively and militantly racist. Their target was primarily Negroes, and secondarily, Jews. It is sufficient to observe with the court below, that the speakers engaged in deliberately derogatory, insulting, and threatening language, scarcely disguised by disclaimers of peaceful purposes; and that listeners might well have construed their words as both a provocation to the Negroes in the crowd and an incitement to the whites. The rally continued for something more than an hour, concluding at about 8:25 p. m. The crowd listening to the speeches increased from about 50 at the beginning to about 150 of whom 25% were Negroes.

In the course of the proceedings it was announced that the rally would be resumed the following night, August 7.[1]

On that day, the respondents, officials of Princess Anne and of Somerset County, applied for and obtained a restraining order from the Circuit Court for Somerset County. The proceedings were *ex parte*, no notice being given to petitioners and, so far as appears, no effort being made informally to communicate with them, although this is expressly contemplated under Maryland procedure.[2] The order restrained petitioners for 10 days from holding rallies or meetings in the county "which will tend to disturb and endanger the citizens of the County."[3] As a result, the rally scheduled for August 7 was not held. Ten days later, after trial, an injunction was issued by the Circuit Court, in effect extending the earlier injunction for 10 months. The court had before it, in addition to the testimony of witnesses, tape recordings made by the police of the August 6 rally.

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[1] Petitioner Norton said, "I want you to . . . be back here at the same place tomorrow night, bring every friend you have . . . . We're going to take it easy tonight . . . " and "You white folks bring your friends, come back tomorrow night. . . . Come on back tomorrow night, let's raise a little bit of hell for the white race."

[2] Maryland Rules of Procedure BB 72.

[3] The text of the Writ of Injunction is as follows:

"We command and strictly enjoin and prohibit you the said Joseph Carroll, Richard Norton, J. B. Stoner, Connie Lynch, Robert Lyons, William Brailsford and National States Rights Party from holding rallies or meetings in Somerset County which willl tend to disturb and endanger the citizens of the County and to enjoin you, the said defendants, from using and operating or causing to be operated within the County any devices or apparatus for the application of the human voice or records from any radio, phonograph or other sound making or producing device thereby disturbing the tranquility of the populace of the County, until the matter can be heard and determined in equity, or for a period of ten days from the date hereof.

"Hereof, fail not, as you will act to the contrary at your peril."

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On appeal, the Maryland Court of Appeals affirmed the 10-day order, but reversed the 10-month order on the ground that "the period of time was unreasonable and that it was arbitrary to assume that a clear and present danger of civil disturbance and riot would persist for ten months."

Petitioners sought review by this Court, under 28 U. S. C. § 1257 (3), asserting that the case is not moot and that the decision of the Maryland Court of Appeals continues to have an adverse effect upon petitioners' rights. We granted certiorari.

We agree with petitioners that the case is not moot. Since 1966, petitioners have sought to continue their activities, including the holding of rallies in Princess Anne and Somerset County, and it appears that the decision of the Maryland Court of Appeals continues to play a substantial role in the response of officials to their activities.[4] In these circumstances, our jurisdiction is not at an end.

This is the teaching of *Bus Employees* v. *Missouri*, 374 U. S. 74 (1963), which concerned a labor dispute which had led to state seizure of the business. This Court held that, although the seizure had been terminated, the case was not moot because "the labor dispute [which gave rise to the seizure] remains unresolved. There thus exists . . . not merely the speculative possibility of invocation of the [seizure law] in some future labor dispute, but the presence of an existing unresolved dispute which continues. . . ." 374 U. S., at 78.

In *Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. 498 (1911), this Court declined to hold that the case was moot although the two-year cease-and-desist order at issue had expired. It said "The questions involved in the orders of the I. C. C. are usually continuing . . . and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review. . . ." 219 U. S., at 515.

These principles are applicable to the present case. The underlying question persists and is agitated by the continuing activities and program of petitioners: whether, by what processes, and to what extent the authorities of the local governments may restrict petitioners in their rallies and public meetings.

This conclusion—that the question is not moot and ought to be adjudicated by this Court—is particularly appropriate in view of this Court's decision in *Walker* v. *Birmingham*, 388 U. S. 307 (1967). In that case, the Court held that demonstrators who had proceeded with their protest march in face of the prohibition of an injunctive order against such a march, could not defend contempt charges by asserting the unconstitutionality of the injunction. The proper procedure, it was held, was to seek judicial review of the injunction and not to disobey it, no matter how well-founded their doubts might be as to its validity. Petitioners have here pursued the course indicated by *Walker;* and in view of the continuing vitality of petitioners' grievance, we cannot say that their case is moot.

Since the Maryland Court of Appeals reversed the 10-month injunction of August 30, 1966, we do not consider that order. We turn to the constitutional problems raised by the 10-day injunctive order.

The petitioners urge that the injunction constituted a prior restraint on speech and that it therefore violated the principles of the First Amendment which are applicable to the States by virture of the Fourteenth Amendment. In any event, they assert, it was not constitutionally permissible to restrain petitioners' meetings because no "clear and present danger" existed.

Respondents, however, argue that the injunctive order in this case should not be considered as a "prior restraint" because it was based upon the events of the preceding evening and was directed to preventing a continuation of those events, and that, even if considered a "prior restraint," issuance of the order was justified by the clear and present danger of riot and disorder deliberately generated by petitioners.

We need not decide the thorny problem of whether, on the facts of this case, an injunction against the announced rally could be justified. The 10-day order here must be set aside because of a basic infirmity in the procedure by which it was obtained. It was issued *ex parte*, without notice to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings. There is a place in our jurisprudence for *ex parte* issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.

We do not here challenge the principle that there are special, limited circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guaranty of the First Amendment. In *Cantwell* v. *Connecticut*, 310 U. S. 296, at 308 (1939), this Court said that "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot." See also *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942); *Milkwagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 294 (1941). Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so

[4] Petitioners recite that they were denied the right to hold a rally in Princess Anne on July 17, 1967, and that the letter of rejection relied upon the Court of Appeals' decision. They acknowledge that on July 25, they were authorized to hold rallies in Princess Anne on July 28, 29, and 30, 1967; but they appear to complain that the permit stipulated that the sound should not be amplified for more than 250 feet, and that "you will not be permitted to use racial epithets or to make slanderous remarks about the members of any race or ethnic group."

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grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment.[5]

The Court has emphasized that "[a] system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books* v. *Sullivan*, 372 U. S. 58, 70 (1963); *Freedman* v. *Maryland*, 380 U. S. 51, 57 (1965). And even where this presumption might otherwise be overcome, the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit. As the Court said in *Freedman* v. *Maryland, supra*, at 58, a noncriminal process of prior restraints upon expression "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system."

Measured against these standards, it is clear that the 10-day restraining order in the present case, issued *ex parte*, without formal or informal notice to the petitioners or any effort to advise them of the proceeding, cannot be sustained. Cf. *Marcus* v. *Search Warrant*, 367 U. S. 717, 731 (1961);[6] *A Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964).[7] In the latter case, this Court disapproved a seizure of books under a Kansas statute on the basis of *ex parte* scrutiny by a judge. The Court held that the statute was unconstitutional. MR. JUSTICE BRENNAN, speaking for a plurality of the Court, condemned the statute for "not first affording [the seller of the books] an adversary hearing." 378 U. S., at 211. In the present case, the reasons for insisting upon an opportunity for hearing and notice, at least in the absence of a showing that reasonable efforts to notify the adverse party were unsuccessful, are even more compelling than in cases involving allegedly obscene books. The present case involves a rally and "political" speech in which the element of timeliness may be important. As MR. JUSTICE HARLAN, dissenting in *Marcus* v. *Search Warrant*, pointed out, speaking of "political and social expression":

> "It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances. On the other hand, the subject of sex is of constant but rarely particularly topical interest." 378 U. S., at 224.

In the present case, the record discloses no reason why respondents were not notified of the application for injunction. They were apparently present in Princess Anne. They had held a rally there on the night preceding the application for and issuance of the injunction. They were scheduled to have another rally on the very evening of the day when the injunction was issued.[8] And some of them were actually served with the writ of injunction at 6:10 on that evening. In these circumstances, there is no justification for the *ex parte* character of the proceedings in the sensitive area of First Amendment rights.

The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is *ex parte*, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate. The facts in any case involving a public demonstration are difficult to ascertain and even more difficult to evaluate. Judgment as to whether the facts justify the use of the drastic power of injunction necessarily turns on subtle and controversial considerations and upon a delicate assessment of the particular situation in light of legal standards which are inescapably imprecise.[9] In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication.[10]

The same is true of the fashioning of the order. An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ "means that broadly stifle fundamental liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960). In other words, the order must be tailored as precisely as possible to the exact needs of the case. The participation of both sides is necessary for this purpose.[11] Certainly, the failure to invite participation of the party seeking to exercise First

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[5] The elimination of prior restraints was a "leading purpose" in the adoption of the First Amendment. See *Lovell* v. *Griffin*, 303 U. S. 444, at 451–452 (1938).

[6] *Marcus* rejected the contention that *Kingsley Books*, 354 U. S. 436 (1957), supported "the proposition that the State may impose the extreme restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity." 367 U. S., at 736. In *Kingsley*, a New York statute authorizing an injunction *pendente lite* against the distribution of obscene books was upheld. By statute, the person enjoined could get a hearing "within one day after joinder of issue." The New York courts have subsequently held that no *ex parte* injunction may be issued under the statute. *Tenney* v. *Liberty News Distribs., Inc.*, 13 A. D. 2d 770, 215 N. Y. S. 2d 663 (1961).

[7] Compare the considerations leading to the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §§ 101–115. See Frankfurter and Greene, The Labor Injunction 200–205.

[8] The petition for the temporary injunction recited that Carroll and the others against whom the injunction was sought "are presently in Somerset or Wicomico Counties of the State of Maryland."

[9] Cf., Frankfurter and Greene, The Labor Injunction, *supra*.

[10] There is a danger in relying exclusively on the version of events and dangers presented by prosecuting officials, because of their special interest. *Freedman* v. *Maryland, supra*, at 57–58.

[11] Cf. *Williams* v. *Wallace*, 240 F. Supp. 100 (M. D. Ala. 1965). There District Judge Johnson initially refused to issue an injunction *ex parte* against the absent state officials. Then, after a hearing at which the plaintiffs submitted a detailed plan for their proposed Selma-Montgomery march, he enjoined the State from interfering with the march as proposed in the plan.

Amendment rights reduces the possibility of a narrowly drawn order, and substantially imperils the protection which the Amendment seeks to assure.

Finally, respondents urge that the failure to give notice and an opportunity for hearing should not be considered to invalidate the order because, under Maryland procedure, petitioners might have obtained a hearing on not more than two days' notice. Maryland Rules of Procedure BB 72. But this procedural right does not overcome the infirmity in the absence of a showing of justification for the *ex parte* nature of the proceedings. The issuance of an injunction which aborts a scheduled rally or public meeting, even if the restraint is of short duration, is a matter of importance and consequence in view of the First Amendment's imperative. The denial of a basic procedural right in these circumstances is not excused by the availability of post-issuance procedure which could not possibly serve to rescue the August 7 meeting, but at best, could have shortened the period in which petitioners were prevented from holding a rally.

We need not here decide that it is impossible for circumstances to arise in which the issuance of an *ex parte* restraining order for a minimum period could be justified because of the unavailability of the adverse parties or their counsel, or perhaps other reasons. In the present case, it is clear that the failure to give notice, formal or informal, and to provide an opportunity for an adversary proceeding before the holding of the rally was restrained, is incompatible with the First Amendment. Because we reverse the judgment below on this basis, we need not and do not decide whether the facts in this case provided a constitutionally permissible basis for temporarily enjoining the holding of the August 7 rally.

Reversed.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE DOUGLAS, while joining the opinion of the Court, adheres to his dissent in *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 446–447, and to his concurring opinion in *Freedman* v. *Maryland*, 380 U. S. 51, 61–62.

ELEANOR HOLMES NORTON, New York, N.Y., and WILLIAM H. ZINMAN, Baltimore, Md. (MELVIN L. WULF and LEON FRIEDMAN, with them on the brief) for petitioners; S. LEONARD ROTTMAN, Assistant Attorney General of the State of Maryland, and ALEXANDER G. JONES, Attorney for Town of Princess Anne (FRANCIS B. BURCH, Attorney General, and THOMAS S. SIMPKINS, with them on the brief) for respondents.

ture shall have power, by law, to regulate the wearing of arms, with a view to prevent crime.

§ 24. Military subordinate to civil authority

Sec. 24. The military shall at all times be subordinate to the civil authority.

§ 25. Quartering soldiers in houses

Sec. 25. No soldier shall in time of peace be quartered in the house of any citizen without the consent of the owner, nor in time of war but in a manner prescribed by law.

§ 26. Perpetuities and monopolies; primogeniture or entailments

Sec. 26. Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.

§ 27. Right of assembly; petition for redress of grievances

Sec. 27. The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.

§ 28. Suspension of laws

Sec. 28. No power of suspending laws in this State shall be exercised except by the Legislature.

§ 29. Provisions of Bill of Rights excepted from powers of government; to forever remain inviolate

Sec. 29. To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.

THOMAS WYNEVILLE et al. VS. TAIT, L.O. et al. MAYOR of JONESBORO, LOUISIANA 1966
(HARASSMENT of NEGROES BY POLICE)

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

NELLIE THOMPSON, individually and on behalf of her son TOMMY JEAN THOMPSON; MATTIE THOMPSON; ANNIE JOHNSON; individually and on behalf of all other persons similarly situated.

Plaintiffs

vs.

CIVIL ACTION NO. 61,813

L. O. TAIT, individually and as Mayor of the Town of Jonesboro; ADRIAN PEAVY, individually and as Chief of Police of the Town of Jonesboro; WILL HENDERSON, individually and as a police officer of the Town of Jonesboro; JOHN (first name unknown) PORTER, individually and as a police officer of the Town of Jonesboro.

Defendants

* *

COMPLAINT

TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA:

Jurisdiction:

1. This is a civil action seeking a temporary restraining order, a preliminary injunction, a permanent injunction, monetary damages, and other legal and equitable relief to remedy and to enjoin the deprivation by defendants under color of state law of plaintiffs' rights, privileges, and immunities secured by the First, Fourth and Fourteenth amendments of the constitution of the United States and statutes set out below. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. sections 1343 and 1393, and Title 42 U.S.C. sections 1981, 1983, 1985 and 1986.

Parties:

2. All plaintiffs are Negro citizens of the United States of the State of Louisiana, and are residents of and domiciled in Jonesboro, Louisiana. They sue individually and on behalf of all othersimilarly situated Negro citizens of the Parish of Jackson,

UNITED STATES DISTRICT COURT

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Parties:

2. All plaintiffs are Negro citizens of the United States of the State of Louisiana, and are residents of and domiciled in Jonesboro, Louisiana. They sue individually and on behalf of all others similarly situated Negro citizens of the Parish of Jackson,

and of the Town of Jonesboro. Mrs. Nellie Thompson sues on behalf of her eight year old son, Tommy Jean Thompson.

3. This is a class action pursuant to Rule 23 (a) 3) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting all members of the class who are so numerous as to make it impractical to bring them all before this court. A common relief is sought. The interests of said class is adequately represented by plaintiffs.

4. Defendant L. O. Tait is the Mayor of the Town of Jonesboro. Defendant Adrian Peavy is Chief of Police or Chief Marshal of the Town of Jonesboro. Defendant Will Henderson is a Negro police officer on the police force in the Town of Jonesboro subordinate to defendant Peavy. Defendant John (first name unknown) Porter is a white police officer on the Town of Jonesboro police force.

The defendants are engaged in the enforcement and execution of the laws of the State of Louisiana, Town of Jonesboro, and Parish of Jackson, and have been and upon information and belief, are presently acting under color of authority of the State of Louisiana, Parish of Jackson, and Town of Jonesboro.

Nature of the Claim:

5. Defendants have for a period of time combined and conspired under color of statutes, ordinances, regulations, customs and usages of the State of Louisiana to deprive plaintiffs and others similarly situated, of their rights, privileges and immunities, of their right to equal protection of the law, and of their right to due process of the law, all secured by the constitution and laws of the United States. Unlawful acts committed by defendants and their agents and employees against plaintiffs and others similarly situated are set forth in detail in the paragraphs below.

Statement of the Claim:

6. In the summer of 1965 defendant Henderson without cause shot and wounded Ray Lee Madison, a Negro.

7. In the fall of 1965 defendant Henderson shot and killed Sam Spivey, a Negro with whom he had been drinking all day.

8. On Monday, February 14, 1966, defendant Henderson, in uniform, picked up plaintiff Tommy Jean Thompson at his home to take him to school. The school probation officer had arranged for defendant to take the child to school, because of past absences. Defendant Henderson beat the child before taking him to school. He warned him not to tell anyone about the incident.

9. On Wednesday, February 16, 1966, plaintiff Thompson skipped school; he returned home at 3:00 P.M. Defendant Henderson in uniform, took the child from his home saying he was going to take him to the courthouse to talk to the probation officer. Defendant took him instead to the fair grounds, and beat him a second time. Defendant Henderson, accompanied by defendant Porter brought plaintiff home crying and bleeding. Henderson warned the child, "shut up or I'll take you back there," or words to that effect. He explained that he "had to scare the child to make him go to school," or words to that effect. Defendant did not take plaintiff to the probation officer.

10. Inside plaintiffs' home, defendant Henderson threatened plaintiff Mattie Thompson, the boy's grandmother. He then pulled her glasses off, and hit her on the side of the face. He grabbed her by the shoulders and tore her sweater. Defendant Porter stood by and did nothing.

Henderson also struck plaintiff Fannie Mae Thompson, who was present, in the cheek. She started for the front door, but he jerked her back.

11. On Thursday, February 17, 1966, Cosetta Jackson, a taxi-cab driver, drove the boy's mother to the Justice of the Peace, where she attempted to swear out a warrant for defendant Henderson's arrest. Later that day defendant Henderson in uniform stopped Jackson in his car, and stated that he had heard that Jackson had been doing a lot of talking about him,

that if he,(Jackson) would get out of the car, they could have it out right there, that if he heard of Jackson doing it again he would kill him, or words to that effect. Henderson tried to open Jackson's car door, but it was locked.

Henderson stopped Jackson a second time that day, and again threatened his life.

12. On Friday, February 18, 1966, Henderson again attempted to stop Jackson, but plaintiff drove around him.

13. On Thursday, February 17, 1966 Henderson was suspended from the police force.

14. On Friday, February 18, 1966, plaintiff met with the defendant, Mayor and Chief of Police to endeavor to have Henderson removed from the police force. Plaintiffs set forth the complaints listed in paragraphs 8-12 above, but defendants refused to expel Henderson from the force. The Mayor and Chief of Police reinstated Henderson that day.

15. Defendant Henderson directs traffic at the Hank Elementary School. School children are afraid to pass him; adults walk out of their way to avoid him. He has and continues to induce a state of fear in the Negro community.

16. Defendant Henderson has visited numerous other indignities on the Jonesboro Negro citizenry. He stops lawful drivers on the road and asks them where they are going, and what they are doing. His official position cloaks him with a sense of power, license and security, which unleash his unlawful acts.

17. Despite Henderson's total lack of qualifications as a police official defendants Tait and Peavy, with full knowledge of his activities, allow him to continue to serve as a police official of the Town of Jonesboro. They allow him to serve because his service is a weapon against the Negro community. Their official sanction of his activities here and will continue to encourage his unlawful acts, because he acts without fear of reprisal or reprimand. For these reasons defendants Tait and Peavy are responsible for Henderson's unlawful acts.

17. Defendants under color of law allow Henderson to serve pursuant to a policy,custom, and usage of racial discrimination, and segregation that is actively encouraged, followed and enforced by legislation and by action of the executive and judicial branches of the Town of Jonesboro, Parish of Jackson, and State of Louisiana.

18. Defendants' actions have resulted in and continues to effect an unconscionable and shocking deprivation of plaintiffs' rights secured by the fourteenth amendment to the constitution of the United States, and by 42 U.S.C. section 1981.

The Need For Relief:

19. Plaintiffs have no adequate remedy at law. They have sought Henderson's removal, but defendants have refused. They have sought warrants for his arrest, but he has not been arrested. They have filed complaints with the district attorney, but no charges have been forthcoming.

20. Plaintiffs have suffered and will continue to suffer irreparable harm, mental anguish, and injury. Given (1) defendant Henderson's recent behavior, (2) his capacity for extreme violence, (3) plaintiffs' concerted attempts to have him arrested and removed from the force (4) the Negro community's numerous recent charges with the district attorney (5) Henderson's volatile personality, plaintiffs fear that serious physical harm is imminent.

21. For these reasons it is imperative that defendants Peavy and Porter, and the class of officers subordinate to defendant Peavy be enjoined from failing to protect the Jonesboro Negro citizenry from the unlawful acts of defendant Henderson.

22. Unless this court grants the emergency relief sought, plaintiffs will continue to suffer physical and mental abuse, and a denial of their federal constitution and statutory rights.

23. Because of defendant Henderson's unlawful acts plaintiffs have undergone pain, suffering, fear, mental anguish and humiliation. Compensatory damages can never make plaintiffs whole, but are necessary to afford some relief.

The Prayer for Relief:

WHEREFORE, plaintiffs pray that this Honorable Court issue a temporary restraining order, preliminary and permanent injunctions:

(1) Enjoining defendant Henderson from:

a) Committing or threatening acts of violence,

b) Committing any physical acts or visiting verbal abuse which harasses or intimidates in any way the Negro citizens of Jackson Parish.

c) Unlawfully stopping pedestrians and drivers on the street.

(2) Enjoining defendants Tait and Peavy, their successors and assigns, from failing to permanently remove defendant Henderson from the Jonesboro police force.

(3) Enjoining defendants' Peavy, Porter and all other members of the Jonesboro Police force from failing to protect plaintiffs, and all others similarly situated, from physical and mental abuse at the hands of defendant Henderson.

(4) Enjoining defendants from combining or conspiring among themselves or with other persons to engage in any of the conduct complained of or to subject plaintiffs, and all others similarly situated to physical and mental abuse.

Plaintiffs pray that if this court denies a temporary restraining order, that this case be advanced on the docket and that defendants be ordered ~~on the docket~~ to show cause on the earliest possible date why the preliminary injunction prayed for should not issue.

Plaintiffs further pray for a judgment against defendants individually and in their official capacities for damages inflicted upon plaintiffs as a result of defendants' unlawful acts in the following amounts:

1.	L. O. Tait	$35,000.00
2.	Adrian Peavy	35,000.00
3.	Will Henderson	50,000.00
4.	John (first name unknown) Porter	5,000.00

Plaintiffs further pray that this Court retain jurisdiction of this case for the purpose of enforcing any injunctive

order issued herein, and for such other orders and proceedings as may become necessary.

Plaintiffs further pray that they be accorded their costs, including reasonable attorneys' fees, as well as such other and further relief as may appeal to the Court to be equitable and just.

Respectfully submitted:

ROBERT F. COLLINS

NILS R. DOUGLAS

ATTORNEYS FOR PLAINTIFFS

2211 DRYADES STREET

NEW ORLEANS, LOUISIANA

523-5197

BY:_____

HARRIS DAVID

2211 DRYADES STREET

NEW ORLEANS, LOUISIANA

OF COUNSEL:

ALVIN J. BRONSTEIN

603 N. PARISH STREET

JACKSON, MISSISSIPPI

ATTORNEY'S VERIFICATION

I the undersigned, hereby do depose and say:

1. That I am one of the attorneys for plaintiffs herein authorized to prepare and verify the annexed complaint.

2. That I have read the complaint and know the contents thereof.

3. That the facts set forth are based upon interviews with plaintiffs, and are stated upon information and belief.

4. That I believe the contents to be true.

5. That I sign this complaint on behalf of plaintiffs because the matters therein deal with questions of fact and/or law of which I as an attorney have more knowledge than plaintiffs.

_____

SWORN TO AND SUBSCRIBED
BEFORE ME THIS DAY
OF MARCH, 1966.

NOTARY PUBLIC

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

NELLIE THOMPSON, et al

Plaintiffs

vs.

CIVIL ACTION NO.

L. O. TAIT, et al

Defendants

. . . . . .

TEMPORARY RESTRAINING ORDER

Whereas in the above named cause it has been made to appear by the verified complaint filed herein on the day of 1966, presented to the Honorable , Judge of the United States District Court for the Western District of Louisiana, that a restraining order preliminary to hearing upon notice for a preliminary injunction should issue without notice, because immediate and irreparable injury, loss and damage will result to the plaintiffs before notice can be served and a hearing had thereon; and

Whereas the unlawful acts of defendants, their agents, employees, representatives and other persons in active concert with them, under color of statute, ordinance, regulation, custom or usage of the State of Louisiana have subjected, or caused to be subjected, plaintiffs and others similarly situated to the deprivation of rights, privileges, or immunities secured by the Constitution and laws of the United States;

Whereas notice and hearing before entering a temporary restraining order should not be required because plaintiffs have no adequate remedy at law;

IT IS ORDERED that defendants, their agents, representatives, successors, and assigns be enjoined from:

1. Combining or conspiring among themselves or with other persons to engage in conduct which subjects plaintiffs and all others similarly situated to physical and mental abuse.

IT IS FURTHER ORDERED that defendant Henderson be enjoined:

1. From committing or threatening acts of violence.

2. From committing any physical acts, or visiting any verbal abuse which harasses or intimidates in any way the Negro citizens of Jackson Parish.

3. From unlawfully stopping drivers and pedestrians on the street.

IT IS FURTHER ORDERED that defendants Tait and Peavy shall take immediate steps to remove defendant Henderson from the police force.

IT IS FURTHER ORDERED that defendants Peavy, Porter and all other members of the Jonesboro PoliceForce be enjoined from failing to protect plaintiffs and all others similarly situated, from physical and mental abuse, harassment, and intimidation at the hands of defendant Henderson.

DATED: _____ UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

NELLIE THOMPSON, et al

Plaintiffs

vs. CIVIL ACTION NO.

L. O. TAIT, et al

Defendants

* *

ORDER TO SHOW CAUSE

Upon the verified complaint herein:

IT IS ORDERED that defendants show cause at the United States District Court for the Western District of Louisiana in the United States Courthouse in Monroe, Louisiana on March, , 1966 at o'clock why the preliminary injunction herein prayed for should not issue.

IT IS FURTHER ORDERED that copies of this order to show cause be served upon all parties hereto immediately, and that the United States Marshal endorse his return on the original hereof.

DATED:

UNITED STATES DISTRICT JUDGE

APR 29 1966

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

NELLIE THOMPSON, ET AL., PLAINTIFFS	*	
VS	*	CIVIL ACTION NO. 11,813
L.O. TAIT, ET AL., DEFENDANTS	*	

* * * * * * * * * * * * * * * * *

AMENDED COMPLAINT

Pursuant to Rule 15 of the Federal Rules of Civil Procedure and the oral order of this Court, entered during the hearing in this matter on March 12, 1966, at the United States Courthouse in Monroe, Louisiana, said order granting plaintiffs leave to amend their complaints; plaintiffs hereby amend the original and amended complaints in this matter.

Plaintiffs respectfully request the following amendments:

1. The caption set forth in the amended complaint is amended to read:

> L.O. Tait, individually and as Mayor of the Town of Jonesboro, Sammy Flowers; individually and as police officer of the Town of Jonesboro; E.L. Thompson, individually and as Commissioner of Police of the Town of Jonesboro, and as a member of the Board of Aldermen of the Town of Jonesboro; The Board of Aldermen of the Town of Jonesboro; R.L. Salter, Jr., Alderman of the Town of Jonesboro; J.P. Gimber, Alderman of the Town of Jonesboro; F.L. Calvin, Sr., Alderman of the Town of Jonesboro; Emmett E. Rogers, Alderman of the Town of Jonesboro.

2. Paragraph 2 in the amended complaint is amended to read:

> Defendant E.L. Thompson is the Commissioner of Police of the Town of Jonesboro, and is a member of the Board of Aldermen of the Town of Jonesboro. Defendant Sammy Flowers is a police officer on the Town of Jonesboro police force. The Board of

Aldermen of Jonesboro is the governing body of that town. It has power, along with the Mayor and Chief of Police, to discharge and to suspend officers from the police force. Defendants R.L. Salter, Jr., J.P. Gimber, F.L. Calvin, Sr., and Emmett E. Rogers are members of the Board of Aldermen of the Town of Jonesboro.

3. Paragraph 4 of the amended complaint is amended to read:

On Friday, February 18, 1966, plaintiffs met with defendants Tait and Peavy to endeavor to have Henderson removed from the police force.

4. In paragraphs 5,6,9 and 12 of the amended complaint, the words, "Board of Aldermen" are substituted for the words, "Town Council."

5. In paragraphs 10 and 11 of the amended complaint, in paragraphs 9 and 10 of the original complaint, in the prayer of the original complaint and in the caption of the amended complaint, the name "Poda" is substituted for the name "Porter."

6. The following paragraph is supplemented to paragraph 7 of the original complaint and designated as paragraph 7(b):

7(b). In November 1965, defendant Henderson was working on a car on the property of Willie Harris, an auto mechanic who owns his own garage. Upon discovering this fact, Harris stated that he didn't appreciate Cleave sending someone to work on the car, or words to that effect. Harris went back in his house and started eating. Defendant Henderson entered and threatened Harris' life with a gun.

7. Plaintiffs pray that defendants R.L. Salter, Jr., J.P. Gimber, F.L. Calvin, Sr., Emmett E. Rogers and the Board of Aldermen of the Town of Jonesboro be ordered to show cause at the United S States Courthouse in Monroe, Louisiana, on March 15, 1966 at 9:30 A.M. why the preliminary injunction sought against them should not issue.

Plaintiffs further pray that the United States Marshal be directed to serve these defendants on Monday, March 14, 1966.

COLLINS, DOUGLAS AND ELIE
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA

BY: _____

Aldermen of Jonesboro is the governing body of that town. It has power, along with the Mayor and Chief of Police, to discharge and to suspend officers from the police force. Defendants R.L. Salter, Jr., J.P. Gimber, F.L. Calvin, Sr., and Emmett E. Rogers are members of the Board of Aldermen of the Town of Jonesboro.

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4. In paragraphs 5,6,9 and 12 of the amended complaint, the words, "Board of Aldermen" are substituted for the words, "Town Council."

5. In paragraphs 10 and 11 of the amended complaint, in paragraphs 9 and 10 of the original complaint, in the prayer of the original complaint and in the caption of the amended complaint, the name "Poda" is substituted for the name "Porter."

6. The following paragraph is supplemented to paragraph 7 of the original complaint and designated as paragraph 7(b):

7(b). In November 1965, defendant Henderson was working on a car on the property of Willie Harris, an auto mechanic who owns his own garage. Upon discovering this fact, Harris stated that he didn't appreciate Cleave sending someone to work on the car, or words to that effect. Harris went back in his house and started eating. Defendant Henderson entered and threatened Harris' life with a gun.

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Plaintiffs further pray that the United States Marshal be directed to serve these defendants on Monday, March 14, 1966.

COLLINS, DOUGLAS AND ELIE
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA

BY: _____

ATTORNEY'S VERIFICATION

I, the undersigned, hereby do depose and say:

1. That I am one of the attorneys for plaintiffs herein authorized to prepare and verify the annexed complaint.

2. That I have read the amended complaint and know the contents thereof.

3. That the facts set forth are based upon written statements, interviews with plaintiffs, and are stated upon information and belief.

4. That I believe the contents to be true.

5. That I sign this complaint on behalf of plaintiffs, because the matters therein deal with questions of fact and/or law of which I as an attorney have more knowledge than plaintiffs.

_____

SWORN TO AND SUBSCRIBED
BEFORE ME THIS DAY
OF MARCH, 1966.

_____
NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the amended complaint has be placed in the United States Mail, postage prepaid, air mail, special delivery, addressed to David T. Caldwell, P.O. Drawer 666, Jonesboro, Louisiana, and to W. Jackson Emmons, P.O. 726, Jonesboro, Louisiana.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

NELLIE THOMPSON, ET AL., PLAINTIFFS	*	
VS	*	CIVIL ACTION NO. 11,813
L.O. TAIT, ET AL., DEFENDANTS	*	

* * * * * * * * * * * * * * * * *

ORDER TO SHOW CAUSE

Upon the verified complaint herein:

IT IS ORDERED that defendants show cause at the United States District Court for the Western District of Louisiana in the United States Courthouse in Monroe, Louisiana on March 15, 1966 at 9:30 A.M. o'clock why the preliminary injunction herein prayed for should not issue.

IT IS FURTHER ORDERED that copies of this order to show cause and of the original and amended complaints be served upon all parties hereto on March 14, 1966, and that the United States Marshal endorse his return on the original hereof.

DATED:

_____

UNITED STATES DISTRICT JUDGE

THOMPSON, QUEEN, ESTHER VS. JAMES, TONY MONROE, LOUISIANA 1965-

Box 43
Folder 20

...rical Society Of Wisconsin

Please Retain Original Order

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

MRS. QUEEN ESTHER THOMPSON,

PLAINTIFF,

vs.

CIVIL ACTION NO.

TONY JAMES D/B/A
BLUE GRILL RESTAURANT

DEFENDANTS.

* * * * * * * *

COMPLAINT

1. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. section 1343 (3) and section 1343 (4). This is a suit in equity authorized by and instituted pursuant to Title II of the Act known as the "Civil Rights Act of 1964," 78 Stat. 243, and Title 42 U.S.C. section 1983. The jurisdiction of this Court is invoked to secure protection of civil rights and to redress deprivation of rights, privileges, and immunities secured by (a) the Fourteenth Amendment of the Constitution of the United States, Section 1; (b) the Commerce Clause, Article 1, Section 8, Clause 3, of the Constitution of the United States; (c) Title II of the Act known as the "Civil Rights Act of 1964," 78 Stat. 243, providing for injunctive relief against discrimination in places of public accommodation and (d) Title 42 U.S.C. section 1981, providing for the equal rights of citizens and all persons within the jurisdiction of the United States.

2. Plaintiffs bring this action on their own behalf and on behalf of others similarly situated pursuant to Rule 23 (a) (3) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting the rights of other Negro persons to use the goods, services, facilities, privileges, advantages and accommodations of Blue Grill Restaurant without discrimination and segregation on the ground of race or color who are so numerous as to make it impracticable to bring them all before this Court.

A common relief is sought. The interests of said class are adequately represented by plaintiffs.

3. This is a proceeding for an injunction restraining defendants from continuing or maintaining any policy, practice, custom and usage of withholding, denying, attempting to withhold or deny, or depriving or attempting to deprive, or otherwise interfering, with the rights of plaintiffs and others similarly situated to admission to and full use and enjoyment of the goods, services, facilities, privileges, advantages and accommodations of Blue Grill Restaurant without discrimination and segregation on the ground of race or color.

4. Plaintiff, QUEEN ESTHER THOMPSON is a citizen of the United States and the State of Louisiana.

5. Plaintiff alleges on information and belief that defendant is an unincorporated association doing business under the laws of Louisiana at 405 Allen Avenue in Jonesboro, Louisiana.

6. Blue Grill Restaurant serves and offers to serve interstate travellers. Its operations affect travel, trade, traffic, commerce, transportation or communications among, between and through the several states, the District of Columbia or foreign countries, territories and possessions. A substantial portion of the food which it serves moves in commerce.

7. On March 24, 1965, at about 2 P.M., four persons went to the Blue Grill Restaurant at 405 Allen Street, Jonesboro, Louisiana in an attempt to secure service. While there they were refused service and the police were called. Six policemen arrived and one of them told them to get out. When asked why, he replied that they were not wanted in the restaurant. One of the officers pulled Smith up from the table and told him to get out. Smith was taken across the street and was searched by the police. When they asked the police if they were under arrest no one answered. They were told by the police to get out. They then left.

8. Discrimination and segregation at the Blue Grill Restaurant is supported by the action of the State of Louisiana within the meaning of the Fourteenth Amendment to the Constitution of the United States and Title II of the Act known as the "Civil Rights Act of 1964" 74 Stat. 243. Said discrimination is carried on under the color of State law and under the color of custom and usage enforced by officials of the State of Louisiana.

9. Plaintiffs were denied and deprived of service at Blue Grill Restaurant because of defendant's well-established and maintained policy, practice, custom and usage of refusing to serve, and discriminating against Negroes at Blue Grill Restaurant in violation of plaintiffs' rights to full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of places of public accommodation without discrimination and segregation on the ground of race or color as secured by (a) the Fourteenth Amendment of the Constitution of the United States; (b) the Commerce Clauses, Article 1, section 8, Clause 3, of the Constitution of the United States; (c) Title II, of the Act known as "The Civil Rights Act of 1964," 78 Stat. 243, providing for injunctive relief against discrimination in place of public accommodation; and (d) Title 42 U.S.C. section 1981.

10. Plaintiffs alleges that the racially discriminatory practices of defendants are in continuance of a long-established and maintained policy of defendants in the operation of the Blue Grill Restaurant. The State of Louisiana has no state law and the City of Jonesboro has no local law prohibiting the racially discriminatory practices described above and establishing or authorizing a state or local authority to grant or seek the relief prayed herein. Plaintiffs have no plain adequate or complete remedy at law to redress these wrongs, and this suit for injunction is the only means of securing adequate relief. Plaintiffs are now suffering and will continue to suffer irreparable injury from defendants' policy, practice, custom and usage as set forth herein.

WHEREFORE, plaintiffs respectfully pray this Court advance this cause on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited, and upon such hearing to:

1. Forever enjoin defendant TONY JAMES D/B/A Blue Grill Restaurant, their agents, successors, employees, attorneys, and those acting in concert with them and at their direction from continuing or maintaining any policy, practice, custom or usage of denying, abridging, withholding, conditioning, limiting, or otherwise interferring with plaintiffs and other similarly situated in the admission to and use and enjoyment of the goods, services, facilities, privileges, advantages and accommodations of Blue Grill Restaurant on the basis of race or color as contrary to the Fourteenth Amendment to the Constitution of the United States, the Commerce Clause, Article 1, section 8, Clause 3 of of the Constitution of the United States, Title II, 78 Stat. 243 of the Act known as the "Civil Rights Act of 1964," and Title 42 U.S.C. section 1981.

II. Allow plaintiffs their costs herein, including reasonable attorney's fees and such other, additional, relief as may appear to the Court to be equitable and just.

Respectfully,

ROBERT F. COLLINS

NILS R. DOUGLAS

LOLIS E. ELIE

2211 DRYADES STREET

NEW ORLEANS, LOUISIANA

523-5197

ATTORNEYS FOR PLAINTIFFS

BY: _____

OF COUNSEL:

CARL RACHLIN
38 PARK ROW
NEW YORK 38, NEW YORK

PLEASE SERVE
TONY JAMES AT
BLUE GRILL RESTAURANT
405 ALLEN STREET
JONESBORO, LOUISIANA

THOMPSON, THOMAS, A. VS. HENRY, SHERMAN, ALONZO et al. WILLIAMSBURG, S. CAROLINA 1966

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COPY COPY COPY

STATE OF SOUTH CAROLINA)
COUNTY OF WILLIAMSBURG)

IN THE COURT OF COMMON PLEAS

Thomas A. Thompson,

Plaintiff,

-vs-

Sherman Alonzo Henry, Oneeda Dukes, and the Congress of Racial Equality, a Corporation,

Defendants.

S U M M O N S

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer on the subscribers at their offices at 106 South Academy Street, Kingstree, South Carolina, within twenty (20) days after the service thereof upon you, exclusive of the day of service, and if you fail to answer the Complaint within the time aforesaid, the plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

LEONARD B. BURGESS
NETTLES AND THOMY

signed
Attorneys for Plaintiff

Kingstree, South Carolina

June 30, 1966

COPY COPY COPY

STATE OF SOUTH CAROLINA)
COUNTY OF WILLIAMSBURG) IN THE COURT OF COMMON PLEAS

Thomas A. Thompson,

Plaintiff,

-vs-

Sherman Alonzo Henry, Oneeda Dukes and the Congress of Racial Equality, a corporation,

Defendants.

C O M P L A I N T

The plaintiff, complaining of the defendants herein, alleges and states:

1. That plaintiff is a resident and citizen of the County of Williamsburg, State of South Carolina.

2. That defendant, Sherman Alonzo Henry, is a minor over the age of fourteen (14) years and resides in Monroe, Louisiana; that the defendant, Oneeda Dukes, is a resident and citizen of the County of Williamsburg, State of South Carolina; and the defendant Congress of Racial Equality is a foreign membership corporation, having been organized and existing under the laws of the State of New York and having officers and agents in the State of South Carolina where they pursue the business and purposes of the corporation, but has failed to qualify as a foreign corporation in the State of South Carolina and has appointed no agent therein upon whom service of process may be acquired; therefore plaintiff is entitled to secure service of this Summons and Complaint on it by service upon the Secretary of State of South Carolina.

3. That heretofore on or about December 19, 1965, plaintiff was driving his automobile in a northerly direction on South Carolina Highway 377 at a point about eight-tenths (8/10) of a mile from Kingstree, in the County of Williamsburg and State of South Carolina. That at said time and place the defendant, Sherman Alonzo Henry was driving a 1961 Chevrolet automobile owned by defendant, Oneeda Dukes; in a southerly direction on South Carolina

Highway 377 and was meeting the automobile of plaintiff. That then and there, as the automobile being driven by defendant, Sherman Alonzo Henry, approached the automobile of plaintiff, it was suddenly and without warning driven by the defendant, Sherman Alonzo Henry, across the center line of the highway directly into the path of the automobile of plaintiff, resulting in a collision of the said vehicles which inflicted serious, severe, painful and permanent injuries to the personof plaintiff together with extensive property damage.

4. That the above described collision between the vehicle of plaintiff and the vehicle being driven by the defendant, Sherman Alonzo Henry, was caused and occasioned by the willful, wanton, reckless, negligent, careless and unlawful acts on the part of the said Sherman Alonzo Henry in the operation of the said automobile in the following particulars:

(a) In failing to yield the right of way to the vehicle of plaintiff;

(b) In failing to maintain a proper lookout;

(c) In failing to keep the automobile he was driving under proper control;

(d) In failing to apply his brakes or stopping his automobile in order toavoid a collision with the automobile in which plaintiff was riding;

(e) In operating a motor vehicle at an excessive and dangerous speed and too fast for the condition existing at the said time and place;

(f) In operating a motor vehicle upon a public road in a reckless,dangerous, heedless and negligent manner without due regard for the rights of plaintiff and others lawfully on said highway;

(g) In suddenly and without giving any warning or signal, turning the vehicle he was driving directly into the path and lane of travel of the automobile of plaintiff;

(h) In driving his vehicle to his left of the center line of the highway;

(i) In operating said motor vehicle at the time and place above stated while under the influence of alcoholic beverages or drugs;

All of the above in violation of the laws of the State of South Carolina.

5. That on information and belief, at all times hereinafter mentioned, the 1961 Chevrolet automobile being operated by the defendant, Sherman Alonzo Henry, was owned, maintained and provided by the defendant, Oneeda Dukes, for the use and benefit of her family including her daughter at that time residing with her, who is known, upon information and belief, as Baby Ray Dukes, and that at said time and place the defendant, Oneeda Dukes, had entrusted the care, custody and control of the said vehicle to the defendant, Sherman Alonzo Henry, for his use and the use and benefit of her said daughter, Baby Ray Dukes, who resided within her household; and further that at said time and place the said Sherman Alonzo Henry was operating said vehicle with the consent and permission of said Oneeda Dukes and as her agent, servant and employee and under the Family Purpose Doctrine of the State of South Carolina; he being at that time a resident or guest in her household. Further, that the said Sherman Alonzo Henry was, on information and belief, at said time and place a member of and an employee and agent of the defendant, Congress of Racial Equality, and was at that time within the course of his employment and in furtherance of the business and purposes of said defendant at the time and place when the collision occurred.

6. That the acts of negligence, recklessness, carelessness, willfulness and wantoness of defendant, Sherman Alonzo Henry, individually and as agent, servant and employee of defendant, Congress of Racial Equality; and as agent, servant and employee of defendant, Oneeda Dukes and under the Family Purpose Doctrine of the State of South Carolina, as above alleged, was the direct and proximate cause of the collision resulting therefrom, and the injuries and damages sustained by plaintiff, as follows:

(1) A laceration of frontal scalp, above and below the half line;

(2) Contusion of Chest cage and of the pectoral musculature;

(3) Contusion of right knee;

(4) Extensive and costly hospitalization and medical care necessitated as a result of the above injuries which will continue into the future;

(5) Loss of earnings and earning capacity as a result of the above injuries, which will continue into the future and be permanent;

(6) Partial permanent bodily disability as a result of the above injuries;

(7) Permanent disfiguring scars about the face and body;

(8) Serious, severe and permanent injuries to back and neck of an internal nature;

(9) Extreme pain, suffering and mental anguish as a result of the above outlined injuries and the treatment thereof which will continue into the future and be permanent;

(10) Extensive damage to the 1965 Buick automobile of plaintiff, necessitating costly repairs thereof and loss of use of same while being repaired, together with depreciation in value thereof due to having been wrecked;

All of the above to the damage of the plaintiff in the amount of One Hundred Thousand ($100,000.00) Dollars, actual and punitive damages.

W H E R E F O R E, plaintiff prays judgment against defendants in the sum of One Hundred Thousand ($100,000.00) Dollars, actual and punitive damages, and for the costs of this action.

LEONARD B. BURGESS
NETTLES AND THOMY

signed
Attorneys for Plaintiff

Kingstree, South Carolina

June 30, 1966

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF WILLIAMSBURG

Thomas A. Thompson,

Plaintiff,

-vs-

ANSWER

Sherman Alonzo Henry, Oneeda Dukes, and the Congress Of Racial Equality, a Corporation,

Defendants.

The defendant, Congress Of Racial Equality, a Corporation, answering the Complaint herein, respectfully shows the Court:

FOR A FIRST DEFENSE

I

That it denies each and every allegation in said Complaint contained not hereinafter specifically admitted, qualified, or explained.

II

Paragraph I of the Complaint is admitted.

III

The defendant admits so much of Paragraph II of the Complaint as alleges "and the defendant, Congress Of Racial Equality, is a foreign membership corporation having been organized and existing under the laws of the State of New York": the remainder of Paragraph II of the Complaint is denied.

IV

Paragraph III of the Complaint is denied.

V

Paragraph IV of the Complaint is denied.

VI

Paragraph V of the Complaint is denied.

VII

Paragraph VI of the Complaint is denied.

FOR A SECOND DEFENSE

I

The allegations of the First Defense are hereby adopted for this defense.

II

The defendant, Congress Of Racial Equality, a Corporation, specifically denies that at any times alleged in the Complaint, that the defendant, Sherman Alonzo Henry, was a servant, member, employee, or an agent of the defendant, Congress Of Racial Equality, a Corporation.

III

The defendant, Congress Of Racial Equality, a Corporation, specifically denies that at the times alleged in the Complaint Sherman Alonzo Henry was acting as a member, servant, employee, or an agent of the defendant, Congress Of Racial Equality, a Corporation.

WHEREFORE, defendant prays that the prayer of the Complaint be denied; that the defendant be dismissed as a party; and for such other and further relief as to the Court may seem just and proper.

FINNEY & GRAY, Attorneys for Defendant,
Congress Of Racial Equality, A Corporation

By:_____

Sumter, South Carolina

October 7, 1966

S. Ca

LAW OFFICES
FINNEY AND GRAY
16½ WEST LIBERTY STREET
SUMTER, S. C. 29151

ERNEST A. FINNEY, JR.
RUBEN L. GRAY

P. O. BOX 836
TELE. 775-1737

January 21, 1966

JAN 25 1965

Mr. Carl Rachlin
Valdeck & Elias
Attorneys at Law
280 Broadway
New York, New York

Re: Sherman Henry

Dear Carl:

We attended the inquest in the above entitled matter last night in Williamsburg County. The testimony developed by the State indicates that the point of collision was in the lane of traffic which was occupied by the decease lady. The State is apparently basing its entire case on the theory that at the time of the accident Henry had been drinking.

We have been in touch with the Liability Carrier for the car which Henry was driving and they indicate that there is some evidence of defective steering mechanism. The Coroner's Jury bound Henry over and his trial will probably be called during the week of February 28th. Frankly and privately from my conversations with Henry and conversations with persons who knew him in Williamsburg County, I am incline to believe that he was drinking at the time of the accident. We will keep you advised of all developments in this matter.

Yours very truly,

Ernest A. Finney, Jr.

Ernest A. Finney, Jr.

jvl

LAW OFFICES
FINNEY AND GRAY
16½ WEST LIBERTY STREET
SUMTER, S. C. 29151

ERNEST A. FINNEY, JR.
RUBEN L. GRAY

P. O. BOX 836
TELE. 775-1737

S. Henry

March 2, 1966

MAR 7 1966

Mr. Carl Rachlin
Attorney at Law
165 W. 46th Street
New York, N. Y. 10036

Dear Carl:

My information indicates that these people are going to attempt to show that there were some Agency relationship existing between CORE and Sherman Henry at the time of the accident, and they are therefore going to attempt to bring civil action against Sherman Henry and CORE. I realize the problems they are going to face in this connection and I am going to keep you advised when the information is given to me.

Yours very truly,

Ernest A. Finney, Jr.

Ernest A. Finney, Jr.

EAF JR:jvl

LAW OFFICES
FINNEY AND GRAY
16½ WEST LIBERTY STREET
SUMTER, S. C. 29151

ERNEST A. FINNEY, JR.
RUBEN L. GRAY

P. O. BOX 836
TELE. 775-1787

March 3, 1966

MAR 7 1966

Mr. Carl Rachlin
Attorney at Law
165 W. 46th Street
New York, N. Y. 10036

Re: Sherman Henry

Dear Carl:

The matter of Sherman Henry in the Criminal Court has been continued until September of 1966. I believe that this course is advisable in view of the fact that the longer we wait to go to Trial the less hard feelings we think might exist. Also there has been a tremendous improvement in the composition of the jurors in Williamsburg County the last term of Court there were two Negroes on the Petit Jury panel and one Negro on the Grand Jury for the Spring term of this year which we recently returned from there were twelve Negroes on the Petit Jury panel and four Negroes on the Grand Jury itself. If this situation continues I believe that we'll be in a much more favorable climate to have Trial in September.

I am aware of the fact that CORE has disassociated, however, I am keeping you informed because I am sure you are concern about the young man.

Yours very truly,

Finney

Ernest A. Finney, Jr.

EAF JR:jvl

cc: Core Legal Defense and Scholarship Funds

LAW OFFICES
FINNEY AND GRAY
16½ WEST LIBERTY STREET
SUMTER, S. C. 29151

ERNEST A. FINNEY, JR.
RUBEN L. GRAY

P. O. BOX 836
TELE. 775-1737

MAR 7 1966

S/Henry

March 3, 1966

Mr. Carl Rachlin
Attorney at Law
165 W. 46th Street
New York, N. Y. 10036

Dear Carl:

This letter is simply to appraise you of the situation, Davidman and Lee surrendered at the Attorney General's Office and I had previously agreed on the bond. Because of some mix-up between the Attorney General and the Local Officials the bond that he had recommended was not approved. I am not at this point going to make an issue of this I have been able to secure a bond from a personal friend of mine and he has agreed to stand the bond. Davidman and Lee surrendered on Monday at about 1 o'clock and about 2:30 o'clock bond was secured and they are now release on a state bond. The Trial is scheduled to begin in Dorchester County on Monday April 4th.

We will send a copy of the Proposed Course of Attack and would appreciate your sending us any suggestions that you may have. I will go into more details of the matter as an opportunity to have a personal conference.

Yours very truly,

Ernest A. Finney, Jr.

Ernest A. Finney, Jr.

EAF JR:jvl

COPY COPY COPY

August 24, 1966

Oneeda B. Dukes
P. O. Box 242
Greeleyville, S. C.

Re: Our File-611 A 2367
Dukes vs Thompson

Dear Madam and Sir:

This will acknowledge receipt of Summons and Complaint in connection with the Suit instituted in the Court of Common Pleas, State of South Carolina, County of Williamsburg against you and entitled as follows: Thomas A. Thompson, Plaintiff vs Mrs. Sherman Alonzo Henry, Oneeda B. Dukes and the Congress of Racial ~~Equality, a Corporation~~, Defendants; two, Thomas Allen Thompson, Plaintiff vs Sherman Alonzo Hernry, Oneeda B. Dukes and the Congress of Racial Equality, a ~~Corporation~~, Defendants; three, Thomas Allen Thompson, Jr., a minor under the age of fourteen (14) years, by his Guardian ad Litem, Thomas Allen Thompson, Plaintiff vs. Sherman Alonzo Henry, Oneeda B. Dukes and the Congress of Racial Equality, a Corporation, Defendants.

In the Complaint, Thomas A.Thompson, Plaintiff vs Sherman Alonzo Henry, Oneeda Dukes, and the Congress of Racial Equality, a Corporation, the amount sued for bodily injuries to one person, Thomas A. Thompson is in the amount of $100,000 actual impunitive damages. In the Complaint Thomas Allen Thompson as Administrator of Estate of Doris Hanna Thompson, Plaintiff vs Sherman Alonzo Henry, Oneeda Dukes and the Congress of Racial Equality, a Corporation, Defendants, in this complaint Thomas A. Thompson as Administrator of Estate of Doris H. Thompson, is claiming $500,000 for the death of Doris Anna Thompson. In the Complaint Thomas Allen Thompson, Jr., a Minor under age of fourteen years, by his Guardian ad Litem, Thomas Allen Thompson, Plaintiff vs Sherman Alonzo Henry, Oneeda Dukes and the Congress of Racial Equality, a Corporation, for the injuries sustained by Thomas Allen Thompson, Jr. Arising out of bodily injury, Thomas Allen Thompson, Guardian ad Litem, claims $20,000 in actual impunitive damages. These demands exceed the limits of our policy, number 2-3504273 issued to Oneeda Bennett Dukes on 10-15-65. The limit of bodily injury liability of $10,000 for one person and $20,000 for all involved is the limit of our liability for all the damages including the damages for care and loss of services, arising out of bodily injury,' sickness or disease including death at any time resulting there from; sustained by one person or any one accident is applicable to each accident subject to above provisions respecting each person.

August 24, 1966

The total limit of our liability for all damages including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons in any one accident; consequently that part of any verdict or verdicts from any one person in excess of $10,000 for one person and $20,000 for more than one person injured as above set forth, must be borne by you. Our attorney, William H. Blackwell, of Wright, Scott, Blackwell and Powers of 234 West Cheves Street, Florence, South Carolina, has been assigned to the defense of your interest in this law suit and has been instructed to enter an appearance and plead at the proper time and defend this suit at your behalf at our expense. However, since the amount of damages sued for is in excess of our liability under the above stated policy you may, if you so desire, at your own expense, associate other attorneys with this attorney.

Please acknowledge receipt of this letter by signing the copy attached and returning it to us in the envelope enclosed for your convenience.

Very truly yours,

signed

Balys P. Laucka
Manager

BPL/ss
cc: 2-Sherman Henry
2303 Short Washington St.
Monroe, La.

Acknowledgement-

Receipt of above letter is acknowledged.

Date_____8/26/66 Signed_____
Sherman Henry

Sherman Henry

LAW OFFICES
FINNEY AND GRAY
16½ WEST LIBERTY STREET
SUMTER, S. C. 29151

ERNEST A. FINNEY, JR.
RUBEN L. GRAY

P. O. BOX 836
TELE. 775-1737

August 31, 1966

SEP 2 - 1966

Attorney Carl Rachlin
165 West 46 Street
New York, New York 10036

Re: Thomas Allen Thompson
-vs-
Oneeda Dukes and
Sherman Henry

Dear Mr. Rachlin:

Enclosed is a copy of the letter we received from the insurance company that insured the Dukes' car stating the amount of their coverage and their intentions in regard to the current lawsuit.

Yours very truly,

Ernest A. Finney, Jr.

Ernest A. Finney, Jr.

EAF Jr:dmm
Enc.

Sherman Henry

LAW OFFICES
FINNEY AND GRAY
16½ WEST LIBERTY STREET
SUMTER, S. C. 29151

ERNEST A. FINNEY, JR.
RUBEN L. GRAY

P. O. BOX 836
TELE. 775-1737

September 6, 1966

Scholarship, Education and
Defense Fund For Racial Equality
Legal Department
150 Nassau Street
New York, New York 10038

Attention: Mr. Carl Rachlin Re: Thompson v. Henry and CORE

Dear Carl:

You did not send us the papers which you indicated on your letter of September 2, 1966.

Yours truly,

Ernest A. Finney, Jr.

EAF Jr:dmm

Teena

How did this happen?

Please take care of this right away. Get out the letter we sent them, it tells what we are enclosing. I believe it included a large number of papers in Thompson v Henry. CR

LAW OFFICES
FINNEY AND GRAY
16½ WEST LIBERTY STREET
SUMTER, S. C. 29151

ERNEST A. FINNEY, JR.
RUBEN L. GRAY

P. O. BOX 836
TELE. 775-1737

crdl
803

September 8, 1966

Mr. Carl Rachlin
165 West 46 Street
New York, New York 10036

Re: Sherman Henry

Dear Carl:

I am sure that you know that I understand CORE's position with regard to the criminal suit in the above entitled matter. I am writing this letter with the hope that you will understand what a hell of a position I am in.

As you will recall, I was originally contacted and became involved in this matter on the assumption that CORE or its Southern Regional office would be responsible for the cost of defense. I am now in the unenviable position of being morally, and perhaps legally, obligated to defend a client in a very serious criminal action without the slightest possibility of any compensation.

As you are probably aware, this young man is more than likely going to be convicted by a jury in Williamsburg County and sentenced to a long prison term. His only hope is an extensive trial on the local level raising numerous constitutional questions and thereafter perfecting an appeal at least to the State Supreme Court, where the results are most uncertain.

I do not expect CORE to become officially involved in this matter; but I do believe, in fairness to this office, that you should submit the $500.00 retainer fee requested some time ago. You can show on the check that this is for services rendered in Dorchester, Sumter, or any other county that you deem advisable.

If you feel so disposed, I would like to discuss this matter with you over the telephone. We go to trial the week of September 19 in Kingstree; and I have at this point received only $20.00, which was merely to protect CORE from any involvement in the matter.

Yours very truly,

Ernest A. Finney, Jr.

Ernest A. Finney, Jr.

EAF Jr:dmm

9/11/66 After meeting w M.R — Okayed expenditure

Sherman Henry

LAW OFFICES
FINNEY AND GRAY
16½ WEST LIBERTY STREET
SUMTER, S. C. 29151

ERNEST A. FINNEY, JR.
RUBEN L. GRAY

P. O. BOX 836
TELE. 775-1737

October 7, 1966

Mr. Carl Rachlin
165 West 46th Street
New York, New York

Dear Mr. Rachlin:

Enclosed please find a copy of the Answer in each of the three cases wherein Congress Of Racial Equality is a defendant.

Yours very truly,

Ernest A. Finney, Jr.

EAF Jr:dmm

Enclosures

October 19, 1966

Mr. Carl Rachlin
165 West 46th Street
New York, New York 10036

Re: State vs. Sherman Henry

Dear Carl:

The thirty days in which to effect the appeal will be up in the above-entitled matter on the 24th of October. As of this date, we have not heard from anybody relative to the counsel's fee or the appellate bond, not to mention the cost of the transcript which we have ordered. I would be deeply grateful if somebody, somewhere, would give me some final advice on this matter.

Yours very truly,

FINNEY & GRAY, ATTORNEYS

By: Ernest A. Finney, Jr.
Ernest A. Finney, Jr.

EAF Jr:dmm

cc: Mr. James T. McCain
Mr. Marvin Rich

COPY

December 5, 1966

Attorney Carl Rachlin
165 West 46th Street
New York, New York 10036

Re: Sherman Henry

Dear Carl:

Following our discussion on Friday down in Beaufort, I assume that we are going to proceed along the following lines:

1. The criminal appeal in the Sherman Henry matter will be ended, this office will attempt to delay the execution of sentence until Henry has completed this semester in school, SEDF will renew Henry's scholarship after completion of the sentence. In connection with this item, we feel that the fellows in New Orleans should contact Henry, who is a student at Gramlin College, and advise us concerning his attitude and, further, whether or not this course of action will interfere with his admission to the Bar.

2. This office will continue to represent the Congress of Racial Equality in the $600,000.00 civil suits.

3. This office will represent Sherman Henry in the $600,000.00 civil suits now pending. We would like your thinking on whether or not if this firm represents both Sherman Henry and CORE, there could be any conclusions drawn which would establish agency. I do not believe so, however, I want your thinking on this matter.

Based upon these conclusions, we would request that SEDF immediately forward us a check in the amount of $1,000.00, which

COPY

LAW OFFICES
FINNEY AND GRAY
16½ WEST LIBERTY STREET
SUMTER, S. C. 29151

ERNEST A. FINNEY, JR.
RUBEN L. GRAY

P. O. BOX 836
TELE. 775-1737

December 8, 1966

Atty. Carl Rachlin
150 Nassau Street
Brooklyn, New York

Dear Carl:

This will acknowledge receipt of your letter of December 6. We will immediately undertake the necessary research to prepare the motion suggested in your letter and if at all possible, present them in court before the next civil term begins.

Yours very truly,

Ernest A. Finney, Jr.

EAF Jr:dmm

December 8, 1966

Mr. E. I. Lawrence
Route 3, Box 58
Salters, South Carolina

Mr. Paul Murray
Route 1, Box 198
Salters, South Carolina

Mr. Jessie Lawrence
Post Office Box 111
Kingstree, South Carolina

Mr. Carl Rachlin
150 Nassau Street
New York, New York

Mr. Sherman Henry
Post Office Box 898
Grambling College
Grambling, Louisana

Mr. Johnnie Dimery
Post Office Box 311
Kingstree, South Carolina

Re: Sherman Henry

Gentlemen:

After the recent meeting down in Frogmore, South Carolina, it was determined that to proceed with the appeal in the Sherman Henry matter would involve grave risk to the future of Sherman Henry, and would be unwise financially and the odds are approximately 100 to 1 against the appeal being successful. By way of explanation, I would like to say that from the point of view of the law, there were few, if any, errors made by the Judge in the Henry trial, which would be necessary for a reversal. In addition thereto, if we were to get a reversal, it would mean a new trial. At the new trial, the original charges against Sherman Henry could be reinstituted, and he would be subject to up to ten years in prison.

This matter was thoroughly gone into by the chief lawyers for the organization, trying to help Sherman Henry through. They have no other interest in the matter, and it was after this conference that the decision was mutually made.

I am sending a copy of this letter to each of you in view of the fact that you have expressed and exemplified such deep concern in this young man's case, with the understanding that

COPY

if you desire to proceed in a different manner, you would contact this office within ten days in order that we might further discuss the matter. If I have not heard from by the end of said time, I will assume that you have no alternate course to offer and proceed with the plan as set forth above.

I have discussed the matter with Sherman Henry, and he apparently understands the risk involved and generally does not protest the decision. If you desire to get in touch with him, his address is at the beginning of this letter. I am sure he can be reached by telephone also.

Thank you very much for your consideration and cooperation in this matter.

Yours very truly,

Ernest A. Finney, Jr.

EAF Jr:dmm

COPY

SEDITIOUS TINSLEY CASE (MISSISSIPPI SHOOTING), 1965

Box 43
Folder 22

Wisconsin

Please Retain Original Order

Lawyers Constitutional Defense Committee, Inc.

Ninth Floor, 156 Fifth Avenue, New York, N. Y. 10010

(212) YU 9-7530

President
LEO PFEFFER
Special Counsel
American Jewish Congress

Vice-Presidents
JOHN M. PRATT
Counsel, Commission on Religion and Race
National Council of the Churches of Christ

CARL RACHLIN
General Counsel
Congress of Racial Equality

Secretary
MELVIN L. WULF
Legal Director
American Civil Liberties Union

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National Affairs Director
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ROBERT L. CARTER
General Counsel
National Association for the Advancement of Colored People

The Rev. ROBERT F. DRINAN, S.J.
Dean
Boston College Law School

JACK GREENBERG
Director-Counsel
NAACP Legal Defense and Educational Fund

CLARENCE B. JONES
Counsel to the
Rev. Dr. Martin Luther King, Jr.

HOWARD MOORE, JR.
Counsel
Student Non-violent Coordinating Committee

Executive Secretary
HENRY SCHWARZSCHILD

MAY 21 1965

Reply to:

Staff Counsel
ALVIN J. BRONSTEIN
603 North Farish Street
Jackson, Mississippi 39202
(601) 948-4191

May 19, 1965

Carl Rachlin, Esq.
CORE
38 Park Row
New York, N. Y.

Re: Tinsley

Dear Carl:

I haven't furnished you with any written material in the above matter because of the lack of time and because of our constant phone communication.

As soon as Tinsley is out of jail which should be today, I will attempt to get up a written report for you giving you the benefit of our investigation, the witnesses' testimony at the hearing, etc.

Sincerely yours,

Alvin J. Bronstein

AJB:jb

I called to advise you of change in this

[enclosed, Bronstein to Rachlin, 1965, May 26]

Matty Hersee Hospital

MRS. PATSY ALAWINE
BUSINESS MANAGER

HENRY E. IRBY, M. D.
DIRECTOR

MISS LUCILLE H. HEARN
DIRECTOR OF NURSES

Meridian, Mississippi

May 21, 1965

TO WHOM IT MAY CONCERN:

The condition of Ivy Lee Harris is satisfactory. He is not in critical condition at this time. He has not fully recovered.

W. R. Holladay M.D.

W. R. Holladay, M.D.

WRH/tg

Lawyers Constitutional Defense Committee, Inc.
Ninth Floor, 156 Fifth Avenue, New York, N. Y. 10010
(212) YU 9-7530

MAY 27 1965

Miss. v Tinsley

President
LEO PFEFFER
Special Counsel
American Jewish Congress

Vice-Presidents
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National Council of the Churches of Christ

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HOWARD MOORE, JR.
Counsel
Student Non-violent Coordinating Committee

Executive Secretary
HENRY SCHWARZSCHILD

Reply to:
Mississippi Field Office
603 North Farish Street
Jackson, Mississippi 39202
(601) 948-4191
ALVIN J. BRONSTEIN
Staff Counsel

May 26, 1965

Carl Rachlin, Esq.
CORE
38 Park Row
New York, N. Y.

Re: Tinsley

Dear Carl:

Rather than do a lot of typing here I am sending you photocopies of various reports, memoranda and notes on testimony at the hearing which I think will give you a pretty good idea what the case is all about.

I am also sending you a clipping from a newspaper about a proposed Jones County, Mississippi school bond issue. Could you follow this in New York and advise me as soon as there is information on it so that we can follow with it here.

Sincerely yours,

Alvin J. Bronstein

AJB:jb
Encls.

[enclosed, Bronstein to Rochlin, 1965, May 26]

Cty atty interview 5/14 in presence of Neil Smith R.S.B

William Richard Tinsley. age 38
Philadelphia COFO.
Divorced - married twice - separated last time.
occ - Task Force Worker CORE
~~Missouri~~ ways altogether.
10th grade in school - read & write
Permaddress - 655 E 97th St Cleveland Ohio
In Phila. Miss - since 8/64

Knows alfred lee Davis ~~since~~ for about November.
never personally had any trouble with him
Does not know Robt Hudson by ~~any~~ name. Does
not know whether he had any trouble with him.

Only Jail - civil rights activities in Meridian.
at age 15 or 16 Indianapolis - witness only - hell raiser

Knows Ivan Lee Harris about 4 mos (not sure)
no trouble with him

Fred Burstrom - does not know him.
odell Coleman (Preston) - knows him from band
plays guitar with local boys. They got him down
here last night. Some percentage arrangement

Name of Place - "formerly Jerry Jones"

Asked by them to collect money. Def was kind of working for them.
Charge on tix for dance 50¢ adults 35¢ kids
Believes Miss Francia Rogers owns place.
Minimum age 16

Does not know when others arrived.
Def arrived at about 8 P.M.
Other persons there - Willie Lewis, Hughie Buckstrom.
About 30 others were - not sure of names.

Trouble was after dance: about 12
I was serving nothing (in terms of beer or whisky).
I was not drinking.
Did not see Frank Le Harris drinking. Does not know if he was intoxicated.
Did not see Alfred Le Davis drinking. He might have been intoxicated
Does not know of any trouble between Davis & Coleman.

He saw guns out there that night

Sandra Watts - was not present there that night
Last saw her about in library at office at about 7:30 last night. She lives at 8 Rev Blocks - Does not know how old she is - about 22 & 23 - single.
"I guess"

Asked by them to collect money. Def was kind of working for them.
Charge on tix for dance 50¢ adults 35¢ kids.
Believes Miss Francia Rogers owns place.
Minimum age 16

Does not know when others arrived.
Def arrived at about 8 P.M.
Other persons there - Willie Lewis, Hughie Backstrom.
About 30 others were - not sure of names.

Trouble was after dance: about 12
I was serving nothing (in terms of liquor only).
I was not drinking.
Did not see Jim Lee Harris drinking. Does not know if he was intoxicated.
Did not see Alfred Lee Davis drinking. He might have been intoxicated
Does not know of any trouble between Davis & Coleman.
He saw guns out there last night

Sandra Watts - was not present there last night
last saw her about in library at office at about 7:30
last night. She lives at 8 Red Blocks - Does not know ~~though~~ how old she is - about 22 & 23 - single.
"I guess"

5/14/65 A.J.B interview alone with Tinsley in jail

He was inside the Cafe. Heard a muckus outside. Heard someone say something about a gun. He knew his gun was in glove compartment of car so he went outside to see if it was still there. It was & he took his gun out and put it in pants pocket & then went back in to Cafe. Then Odell came out said they were beating him up.

He started out to car to take Odell home. Alfred Davis was standing outside with gun in his hand. Alfred said "Come out and I'll blow your brains out too". People said he'd been drinking and had a gun so he went back inside. At one point inside he took out his gun (seen by some people) but he then put it away. He thought he saw Alfred leave so he started out again. Then group of 5-6 started for him and said let's get him. Put hand on hip and tried to scare them off. He had broken ankle and could not run well. He started to run to back of Bldg and tried to hide in "grape arbor". They followed him.

His gun was still in back pocket when he was jumped. They got him down on ground (30' then) Bobby had knife to his neck. He had hand on gun & was on his back on ground. They were trying to get his gun. Some one said "Get back I'll get him" - a coupling shots were fired. They tore his hand out of pants with gun still in his hand. Pants ripped. They were struggling for gun. One had his thumb bent back. He had both hands on gun and at least (2-3) "at" then had his hands on gun. The gun went off. Alfred fell

was on top of him at this time. Fred Jr Bartromiras on top of Bert also. There was only one shot from his gun. They got off & went to the front. Jra had gone to front also & was then lying there. He asked for help. Spur wound in his side - entry of bullet but not exit. He wanted to go for Dr. but others insisted on taking him into a car. He helped put him in car.

Buck at office a gang of them gathered and began beating Fred Jr (including Jra's brother). He tried to stop it.

He They changed clothes and drove a hay home to Preston (Odell?) He then went to Meridian to Mrs Chaney. She was not there but her daughter was - phone not working so he went to Geo Smiths. Then went to Geo Smiths mother to use phone. He was arrested there before he could phone.

He was interrogated in Meridian. Said nothing about gun or incident - No statements.

He had both hands on gun and the shot creased his left middle finger on inside. I saw this

The gun is in his name - No permit

Purchased in Meridian, .25 cal.

He says willing witnesses - Scrappy's mother and other women (See Mrs Rogers)

Odell & other Lee - Perhaps even Jra himself.

5/10/65

A.J.B Investigation

This afternoon Other See Henderson → " - picked up by Price. + driven out of city. He asked him for Richardson. Asked why would Richard lie. Price slapped him. Then took him to Jones office where Ramey + Price were. Price slapped him again. Threatened him with Jail.

Robt Hudson
Alfred See Davis.

Val getting other statements.

Some girl (Bobby Sue Jones) says she was right There and saw Alfred See Davis shoot.

Botty - changing stories all around
He is unstable and had some trouble a few nights before - Knife - claimed gun Threat - jealous over Barbara Chaney. He made Threat v. Def The night before.

Week before Richard cut in at dance on Alfred See Davis - The latter is capable of killing on a moments notice. Alfred See had trouble with drummer on night of shooting - Putting up pants pocket + then he beat him + threatened to shoot him.

Robt Hudson - involved in many fights, shootings etc.
Has been roughly treated by Lawson accession -

[enclosed, Bronstein to Rachlin, 1965, May 26]

Re: Tinsley

Testimony of States Witnesses — Preliminary

Robert Henry Hudson — age [illegible]

Part time carpenter — knows [illegible]

knows Tinsley since at hotel.

May 14, 1965 — saw D at [illegible]

saw him at dance — [illegible]

alfred Lee Dawson was with him — D [illegible]

Son "I helped him" — Stayed [illegible]

stopped changing for admission.

Observed D for 4-5-6 hours

saw him drink several beers. Was [illegible]

guitt a few numbers and was [illegible] entry [illegible]

stors and low [illegible]. Observed D [illegible]

off on two being entry. Only saw him with [illegible]

Saw D with a gun — first time was in doorway.

Asked D to put it up. Told him was in and the gun.

Opinion, as ad — short gun, [illegible] automatic.

Never saw this gun before

First saw gun in hand — D was [illegible]

D said he was going to shoot. D [illegible]

to get gun away. D put it in his pocket

he was not going to put it up.

D ran around the house but [illegible]

anyone, Followed him which [illegible]

and caught D's hand. [illegible]

and fell. Still talking to him.

Other boys came around. D [illegible]

on a couple of times and also "let me up". D said

"No - you probably drunk. D said "let me up or I'll

shoot".

I had his hands and told him to shoot. He

shot while I was holding his hands.

He shot up in the air

Hudson

Ira Lee Harris (16-17) was shot. A lady said Alfred + Robert shot him.

How far away was Ira - doesn't know - guess a few were crowded around - Dark. Thought Ira was kidding at first.

Richard said after that, that he wasn't taking him (Ira) no place.

Does not know whether Hatfield had weapons or made threats etc.

Cross-Exam

Did get powder burns from shot. Scar on right forearm - inside | ~~~ | points towards wrist. Just one shot. Scar on outside of left thumb at first joint [D] grooved burn coming to a point.

Alfred Lee Davis had a gun. Heard no other shots. There were no knives. He had no gun or knife.

Other boys were there but no one else was grabbing D. Too dark to recognize anyone in the back during scuffle.

Did not catch him by his clothes.

Ollie Mae Sheldon - lady who had said who shot Ira.

The gun was pointing up when it went off. Was holding D's both hands. One with each hand. My gun hand holding D's hand + wrist.

How many times D pull his gun - I did not see him pull it, never pulled on him. - just saw it out.

Someone grabbed D by pocket. Does not know where Alfred Lee was during scuffle.

Odelle Coleman and Alfred Lee Davis, had a fight.

Did not see or hear any threats etc.

Alfred Lee Davis - age 20 yrs, Shinton Hill, Phila.
Knows D. - about 6 mos.
Saw him May 14 - at dance at Francis Cafe'
D Taking money at door.
Arrived 9-9:30 - left after 12 o'clock. Was around D all night.
Saw D drink one can of beer.
Saw D with gun after dance stopped. I had a fight with boy who played guitar. The boy had grabbed my pocket etc and I hit him.
D was at door with gun. D. said "He was responsible for boy." They went in.
Then he left the scene & was walking home
Heard fracas and came back.
Heard Bob'T saying, give me the gun. Also heard another boy. Heard D. say the safety was off.
D was on ground on his back - safety off. Era Lee was nearby. I was about 8-10 feet away (as far as from witness chair to A.D.A.)
Saw no threat & heard no threats - only saw scuffle.
Did not see D. pull gun on any one.
Did not see Era do anything. Heard a lady say about Era Lee "this knife was gun". Ollie was shelling.
Era was leaning over and looking when gun went off.
Then I left when Harris was still there. At that time Robert was still on D.
Heard D say nothing after shot.
Heard one shot before the scuffle and think Richard Tinsley was inside at that time. Heard only 2 shots altogether.
D. never pulled a gun on him.
I had a gun. I shot my gun off once that night. I got rid of it the next morning.

About 5 minutes elapsed between his fright (with pistol) and the scuffle. That was when he shot off his gun (in the woods, just like that). He said there were three shots altogether. First his, then the one he heard and then Thisley.
Said nothing about intent.

Otha Lee Henderson – age 17 yrs – Phila.
Knows D about 4 mos.
Sees him at COFO house – single unparalleled
knows – Does not know what he does in terms of
living. Knows he drives Blue Studebaker, does not
know who owns it.
Saw him at Francis at dance
Did not see any alcohol.
Saw D drinking a beer.
He had some beer – given to a boy he does not know.
Who was in charge – Francis Rogers.
Played in band that night – played 3 or

Saw D with a gun in the place – does not
know why he had gun out. Had it down the
side – did not threaten anyone. He was told to
leave. Francis called him & let him out the back
That was only time he saw the gun.
Then he walked down to the football field.
He heard 3 shots and came back.
He saw D with a gun standing near where
Joe Jr Harris was lying.
Heard nothing else.

Saw Botty Baxtrom with a razor
Saw Robt Henry Hudson had a knife

Norman Ackley's rough notes of testimony at preliminary hearing held May 17 in State of Mississippi v. Richard Tinsley

Hearing started 3:25 PM. JP:Leonard Warren
County Atty: Raiford Jones. Defence Attys: Alvin J. Bronstein & Norman F. Ackley

1st Witness: Robert Henry Hudson, Rt. 6, Box 497, Philadelphia
I have known defendant Richard Tinsley since last summer. He lives at a hotel in Philadelphia. On May 14, Thurs night or Fri morn I saw def. at Fromme's cafe. I got to the dance @ 9 pm. Def. was at the door taking the money. I helped him for awhile. He stayed at the door until they stopped charging.
I was there 4-5-6 hours. Saw def. drink several beers- saw him with two cans of beer. (Q as to Def's intoxication was asked, objected to, ob. overruled but Q not repeated).
I saw Def w/gun inside dance hall. He was moving it around. I tried to get def. to give it up. He wouldn't. He went outside. I tried to get him to give me the gun. (It was a short, black, automatic . I think it was a 25 calibe). He put it in his pocket. Wouldn't give it to me. Ran around the building, behind a bush. I tried to talk him out of the gun. He came out talking. I caught his hand. We tussled, tripped and fell . He said "the safety is off. the safety is off. Let me Up". I said " No. You drunk. You might shoot". He said "I will shoot. I'll shoot you. " The gun was in the air pointing up so I said "Go ahead and shoot. He did.
I let him up. I saw Ira Lee Harris lying out in a car. He had been hit. I didn't see him before he was in the car. Someone told Richard to take him to a doctor. He said "I aint going to do anything for him." Someone else did. Ira Lee Harris had no weapon - made no threat.

X-exam: I got a powder burn inside my right wrist. One shot was fired. I was holding his right hand, his wrist. Also had hold of his right hand with my left.
I saw Alfred E. Davis with a gun also. I heard no other shots - saw no knives. I got shot once before. I have no gun- no knife.
Redirect: Ila Mae Shannon said I did it. That I and Alfred Lee Davis did it. I told her we didn't. The bullet tipped my left thumb. The gun was pointed up. He didn't pull his gun on me. I saw him with it out. Someone grabbed him by his pocket. I didn't that I know of. (some of this is re-X)

2ND WITNESS: Alfred Lee Davis/
I have known defendan since he has been here- about 6 mos. Saw him at the dance last Thurs/Fri night. I got there @9 or 9:30. He was taking money at the door. I stayed for the dance. Left @ 12:00 or so. Saw def. with one can of beer.
I saw him with a gun. I had scuffled with the guitar player. He got out a gun. Said he was responsible for him. I got behind (something - car?). I heard someone say "Give me the gun; give me the gun." He said " The safety is off.". Didn't hear Harris threaten anyone. He went around behind the def. and leaned over looking down at them. The gun shot. He hollered he was shot. I had heard an earlier shot. Ila Mae Shannon was there. Mrs. Fromme was there.
X-exam: I had a gun with me that night. Got rid of it the next day. I fired one shot that night. Someone else did and def. did. Hudson was grappling with the def. and some others were standing over them. I was about ten feet away. I didn't see any knife. After the fight with the guitar player I went outside. They told me to go home. I shot my gun into the air going home. I heard a raquet out behind building. I don't know if def. intended to shoot anyone.

3rd Witness: Otho Lee Hanson - 17 yrs.-Philadelphia
I have known def. about 4 months. He is at COFO office. Don't know if he is married or lives with anyone. He drives a blue Studebaker. I saw him at Frommes dance. Saw no beer. Saw def. drink beer at door. I had some beer. Someone gave me some twice. Richard pays me to play in the band. $5.10. Band got 60%; house 40%. I saw def. drink one beer. Saw def. w/gun Didn't see him point it at anyone or say anything.
I went to football field? Heard three shots. Came back. Def. was around in back on ground with gun. Sart Backstrom had a razor round his neck

me of this is X-exam/

Harry Hudson had a knife.
end of Testimony

[enclosed, Bronstein to Rachlin, 1965, May 26]

Tinsley file : NBA memo on 5/21 trip to Meridian and Philadelphia.

Arrived at Meridian about noon; met Joe Morse at COFO hq. He took me to Hospital; said they had not been allowed to visit Ira Lee Harris. After an hour's wait (Superintendent gone; other doctors busy) we were permitted to talk to Harris. He was sitting up in bed and seemed OK. He would not sign the statement; said he knew that Richard shot him and also said that just before he shot him Richard said "Ira, I'm going to shoot you". Nurse in room entire time; doctor's orders.

Called AJB. Called Dr. Atwood to see about medical statement for bond reduction; out. Called hospital; talked to Dr. Atwood; he rather reluctantly agreed to give statement (copy in file). Back at the hospital; Geo. Smith (COFO worker from Meridian) talked to Harris grandmother at Hospital who said Geo. would sign modified statement. Got doctor's permission to see Harris agian (in the presence of the omnipresent redheaded head nurse Miss Lee). Changed statement from "I don't know who shot me" to "Richard Tinsley shot me". Harris almost ready to sign it but, with an assist from nurse, balked at the part about wanting to see the charge against Tinsley dropped. His grandmother told me outside that he sould have signed it but was afraid of nurse; Joe Morse thinks there might be something more than this - possibly some sort of alliance with Batiste(?). I told grandmother and Joe Morse there was no hurry; we'd better not push it; we can get bail reduced and Tinsley out and then there would be plenty of time to talk to Harris after he gets out of the hospital.

To Philadelphia and Jones office. More waiting-he has a nice practice. He read doctor's statement; kept original; gave me copies. He agreed to recommend reduction to $5,000. I tried for $2,500 and then $3,000. He was almost ready to buy the [illegible] but said he would first like to talk to Harris again and would do so Sat aft. We are to call him about [illegible]

[illegible]

Incidental intelligence:

1. Jones has a statement which he took from Harris and which is witnessed by Harris' parents. Presumably same as in 1st paragraph above.
2. Jones has received an inquiry from some police station in Ohio wanting info on Tinsley.
3. Jones wants Tinsley to leave Philadelphia as soon as he is released.
4. Jones still talks about the possibility of dismissing the action if Harris does not want to press charges.

nba

Phone numbers:

Philadelphia COFO 656 9998
Meridian Hosp (Matty Herree) 482 2434
Meridian COFO 485 9286
Dr. Atwood 483 1489
Jones 656 4451.

Memo on 5-19-65 trip to Philadelphia, by Norm Ackle.

Lois Chafee and I departed Jackson about 11:15 AM; arrived Philadelphia about 1:00 PM at COFO office. At 1:20 Alan Schiffman arrived with Curtis Cole, prospective bail surety. Schiffman called Millard Kirkland, another prospective surety and arranged for him to meet us at Mr. Jones office at 1:30.

We did meet there. Jones explained to them their responsibilities as sureties. They said they were willing to sign. The bond was not a property bond but a personal surety bond. Jones explained that was the form of bond they used but that it would not be accepted unless they had property over and above the homestead exemption equal to or greater than the amount of the bond. He questioned them about their property. It appeared from their statements that neither of them had property in the required amount. I pointed out to Jones Sec. 327 of the Mississippi Code. He had apparently never heard of it and went to look it up. He said that the practice there and everywhere he knew of had been to require property in excess of the homestead. I suggested that the language was rather clear and his response was to the effect that he was not going to change a long standing practice in this case and besides even if the statute were applicable they could not comply because the court would not accept any property upon which there was any mortgage or tax owing; Cole had a small mortgage against his property ($1600) and Kirkland had not yet paid this years taxes.

Back to the COFO office. Schiffman said he had assumed they would be accepted because they had in the past on other bonds. (This point had been raised with Jones but his response was that the prior bonds had been for much smaller amounts). Schiffman said they had no one else locally available. I told him we would try to work out a cash bond.

Back to Jones to have him arrange for jail visit to Tinsley. He did so, saying that Bronstein and I could visit him at any time, but no one else other than relatives. The COFO kids had asked me to find out about visitation; I, and tried to unsuccessfully.

I also discussed with Jones the possibility of bail reduction if Harris recovers sufficiently. He said said that we could of course make our motion; that one of the things that would be taken into consideration was not only the degree of Harris' recovery but also his attitue towards the case, i.e. if Harris was insistent on having Tinsley prosecuted they might not reduce the bail. Then he went further and said that since this wasn't really a civil rights case that if Harris wants to withdraw the prosecution maybe the whole thing might be dismissed; that if Harris isn't going to be a prosecution witness they just can't very well try a case without witnesses can they? He said that the three witnesses he had Monday had considerably changed their stories from their previous written statements he has in his file and that someone had "gotte[illegible] them"; that he didn't mean to imply that either Bronstein or I had b[illegible] (that somebody had) that of course he could impeach them but that he didn't really know which statement was true if either.

I suggest we have the doctor in Meridian give us a report about Harris' condition; that if he is off the critical list one of us interview him at the hospital and explore the possibility of either bail reduction or dismissal, preferable the latter, with Jones. He said he had no objection to our talking to Harris if the doctors permit it. Jones asks he does not believe that Harris has any animosity toward him at all.

An interesting sidelight is that when I was walking back from the jail to the car a telephone company panel truck drove by and one of the occupants leaned out and waved to me and said very distinctly "Hello Norm". I looked at him, didn't recognize him, but waved back and he waved again, all in an apparently freindly fashion. I was left with the impression that either folks in Philadelphia are downright freindly or else someone wanted me to know that he knew who I was. If Al mentioned to Schiffman over the phone that Norm would be up maybe this indicates pretty clearly that the COFO phone is bugged. Schiffman thinks it is.

Tinsley still has his beard. So far he has not been badly treated. His spirit is good.

This evening (Wed.) I called Schiffman and told him no dice on visits except for relatives. He expects a call from AJB tomorrow AM.

nbs

Rachel:

Tuesday

September 14, 1965

Mr. Alvin J. Bronstein
Lawyers Constitutional Defense Committee, Inc.
156 Fifth Avenue
New York, New York 10010

Dear Al:

Curl called your letter of September 1st to my attention. We will indeed assume responsibility for these hospital bills. I have turned them all over to our Business Manager for action. Our financial situation is not such that we can pay out of hand, but we will make payment as soon as possible.

Sincerely yours,

George A. Wiley
Associate National Director

GAW:ma

LAWYERS CONSTITUTIONAL DEFENSE COMMITTEE
OF
THE AMERICAN CIVIL LIBERTIES UNION
SOUTHERN OFFICE
603 NORTH FARISH STREET, JACKSON, MISSISSIPPI 39202
(601) 948-4191
ALVIN J. BRONSTEIN, STAFF COUNSEL

September 18, 1965

Dr. George A. Wiley
38 Park Row
New York 38, New York

Re: Tinsley - Ira L. Harris medical bills

Dear George:

I have your letter of September 14 in connection with the payment of the bills in the above matter. I was disturbed to find that after three weeks passed since I sent the bills, your letter was merely a promise of payment, rather than a check.

At the time this matter arose in May, Carl Rachlin and other officials of CORE on their own initiative, unqualifiedly authorized me to guarantee payment of these bills by CORE. I did so, thereby for all practical purposes guaranteeing payment myself. The hospital and doctors are now writing to me with understandable concern about payment.

I am fully aware of CORE's financial problems, but I cannot be placed in this position since it jeopardizes my ability to work effectively, and that means to work for CORE, as well as others. I must insist therefore that payment be remitted by return mail.

Sincerely,

Alvin J. Bronstein

AJB:mg

cc: Carl Rachlin
Henry Schwarzschild

September 21, 1965

Alvin Bronstein, Esq.
LCDC
603 N. Farish Street
Jackson, Mississippi

RE: Tinsley - Harris

Dear Al:

George Wiley has shown to me your letter of September 18, concerning the above. I later received a copy of that letter. I can appreciate your being upset at any delay in payment to those entitled, but I am sure you realize that (a) all will be paid as soon as possible and (b) any delay is not out of whim but the result of a desperate shortage.

We all appreciate what you have done in this and other cases. Do the best you can to assure those expecting to be paid that it will be taken care of as soon as possible.

With kindest regards,

Sincerely,

CARL RACHLIN
General Counsel

CR/cs

cc: Dr. Wiley
Henry Schwarzschild, Esq.

September 30, 1965

John M. Pratt, Esq.
National Council of Churches
475 Riverside Drive
New York, N. Y.

Re: Richard Tinsley

Dear Jack:

As you have probably heard, the case against the above named has been dismissed. I have just obtained the return of the $3000 cash bond, and I am enclosing the refund check which I have endorsed to you.

Thank you again for your timely help in this matter.

Best regards,

Alvin J. Bronstein

AJB:jb

cc: Carl Rachlin
cc: Richard Haley

LAWYERS CONSTITUTIONAL DEFENSE COMMITTEE
OF
THE AMERICAN CIVIL LIBERTIES UNION
SOUTHERN OFFICE
603 NORTH FARISH STREET, JACKSON, MISSISSIPPI 39202
(601) 948-4191
ALVIN J. BRONSTEIN, STAFF COUNSEL

March 27, 1966

MAR 30 1966

Carl Rachlin, Esq.
CORE
38 Park Row
New York, N. Y.

Re: Tinsley - Ira Lee Harris

Dear Carl:

I received a call from the hospital in Meridian the other day and was surprised to hear that the hospital and doctors' bills are still unpaid.

This on top of the Richmond v. Scales matter makes for a great deal of embarrassment for me. Please give this your immediate attention.

I know that CORE has serious financial problems, but in both these instances you authorized me to make representations. I am afraid that hereafter I can only operate for CORE in a situation like this by first getting the money and then making the deal.

Sincerely,

Alvin J. Bronstein

AJB:jb

cc: Marvin Rich

BEDFRE – Toliver, Henrietta & Harold Jr. Vs. City of New York, April, 1962 – Feb., 1964

Box 43
Folder 23

ity of Wisconsin

Please Retain Original Order

376-30M-701390(60) 114

9.00 AM
Tues

131-479

THE CITY OF NEW YORK

COMPTROLLER'S OFFICE

DEMAND FOR EXAMINATION

8/8 1962

In the Matter of the Claim of

Henrietta & Harold Tolliver Jr.

IN REPLY PLEASE REFER TO LAW DEPARTMENT

FILE NO. 39833

To the Above Named Claimants:

PLEASE TAKE NOTICE that pursuant to law you are required to appear at the Office of the Corporation Counsel, Room 1503, Municipal Building, Borough of Manhattan, on the 22 day of August 1962, at 10 00 o'clock in the a m. noon of that day, to be orally examined under oath relative to the occurrence and extent of injuries or damages for which a certain claim was presented by you on July 25, 1962, and to be physically examined in connection with such claim. **PLEASE BRING ALL PHOTOGRAPHS, MEDICAL REPORTS AND X-RAYS.**

Application for adjournment should be made at least five days prior to the date set for examination. All inquiries concerning examinations and adjournments should be addressed to the Office of the Corporation Counsel, Tort Division Examination Unit, Room 1503, Municipal Building, New York 7, N. Y. (WHitehall 3-3600—Ext. 611).

ABRAHAM D. BEAME
COMPTROLLER

Vladeck & Elias Esqs.
280 Broadway
N.Y. 7, N.Y.

W 113-36
Nov. 15, 1962
9:00 am

Mr. & Mrs. Tolliver
by Corp. Counsel Ryan; Mrs. T also examined by the doctor.

- X

In the Matter of the Claim

of

HENRIETTA TOLLIVER and HAROLD TOLLIVER, JR.

-against-

THE CITY OF NEW YORK

- X

TO: COMPTROLLER OF THE CITY OF NEW YORK
Municipal Building
New York City

PLEASE TAKE NOTICE that we, HENRIETTA TOLLIVER and HAROLD TOLLIVER, JR., her husband, pursuant to statute in such cases made and provided, do hereby make claim against the City of New York, its agents, representatives, servants and employees and more particularly certain police officers, employees, agents, servants and representatives of the said City of New York, the names of whom are presently unknown to plaintiff, in the sum of $110,000.00, $100,000.00 on behalf of said HENRIETTA TOLLIVER and $10,000.00 on behalf of said HAROLD TOLLIVER, JR., and in support of such claim, do hereby state the following:

1. Claimants are HENRIETTA TOLLIVER and HAROLD TOLLIVER, JR., her husband. Their post office address is 522 McDonough Street, in the Borough of Brooklyn, County of Kings, City and State of New York. Their attorneys are VLADECK & ELIAS, whose post office address is 280 Broadway, New York 7, New York.

2. The nature of the claim is as follows: the claimants assert a claim for damages by reason of the wrongful assault and battery upon the person and body of said HENRIETTA TOLLIVER and for the wrongful, false and improper arrest of said

HENRIETTA TOLLIVER, and for pain, suffering and shock and injuries suffered by her; and further for the expenses incurred by the said HAROLD TOLLIVER, JR., and the loss of services incurred by him, all as a result of the aforesaid.

3.(a) The time when the claim arose began approximately 9:00 p.m., April 28, 1962 and continued for a period of several hours thereafter.

(b) The place where the claim arose first occurred on the public streets and sidewalks in the vicinity of the intersection Patchen Avenue and McDonough Street, in the Borough of Brooklyn, City and State of New York, and continued thereafter in police vehicles while being forcibly and improperly taken to the 81st Police Precinct located at 16 Ralph Avenue, Brooklyn, and further continued thereafter at the said 81st Police Precinct.

(c) The manner in which the claim arose was a deliberate, unlawful, unjustified, unprovoked, willful and wrongful assault and battery on and the false and improper arrest of the said HENRIETTA TOLLIVER by police officers of the City of New York, whose names are presently unknown to the claimant herein, acting for and on behalf of the said City of New York, and as its agents, employees and servants, and that such beating was upon the body and person of the said HENRIETTA TOLLIVER by using hands and various weapons to beat, seize, drag, pull, attack, illtreat and mistreat the said HENRIETTA TOLLIVER, and without any fault on her part whatsoever. While the said HENRIETTA TOLLIVER was lawfully on the street at and near the aforesaid intersection of McDonough Street and Patchen Avenue in the Borough of Brooklyn, City and State of New York, the said police officers

acting for and on behalf of the said City of New York used unnecessary, unwarranted and improper and illegal force and illegally and falsely took and arrested said HENRIETTA TOLLIVER from the vicinity of Patchen Avenue and McDonough Street to the aforesaid Police Precinct and that illegal and wrongful acts and arrests, batteries and assaults were committed upon the body and person of the said HENRIETTA TOLLIVER, both on the street as described, in the police vehicle and at the 81st Precinct.

That the claim of the said HAROLD TOLLIVER, JR., arises from the expenses incurred by him as a result of the aforesaid beatings, etc. to his wife, HENRIETTA TOLLIVER and for the loss of services of his said wife incurred by him as a result of the aforesaid beatings referred to above.

4. As far as claimants are now able to ascertain the items of injuries and damage sustained by the said HENRIETTA TOLLIVER include severe contusions, abrasions, excruciating pain, shock from which she has suffered ever since and upon information and belief, will continue to suffer as a result of the improper assault and battery as described above and the illegal detention and arrest as described herein.

We, respectively, HENRIETTA TOLLIVER and HAROLD TOLLIVER, JR., request that this claim be allowed and paid.

PLEASE TAKE FURTHER NOTICE that unless this claim is adjusted and paid within 30 days from the date of its presentation to you, it is the intention of the undersigned to commence suit thereon against the City of New York and such of its agents, employees and representatives presently unknown to plaintiff, who in anyway participated in inflicting any of the acts complained of herein to the said HENRIETTA TOLLIVER

and HAROLD TOLLIVER, JR., and to recover the aforesaid sum of $110,000.00, $100,00.00 for said HENRIETTA TOLLIVER and $10,000.00 for said HAROLD TOLLIVER, JR., together with all costs and disbursements.

Dated: New York, July 20, 1962.

/s/ Henrietta Tolliver
HENRIETTA TOLLIVER, Claimant

/s/ Harold Tolliver, Jr.
HAROLD TOLLIVER, JR.

548C—Contingent Retainer—Sliding Scale—1st Dept., App. Div. C

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
80 E[illegible]NGE PLACE, AT BROADWAY, NEW YORK

Retainer

To Carl Rachlin
Vladeck & Elias
280 Broadway, New York 7, N.Y.

The Undersigned, residing at 522 McDonough Street, Brooklyn, New York *hereby retains you to prosecute or adjust a claim for damages arising from—personal injuries sustained by*

loss of services of

property damage to

on the 28th *day of* April *19*62 *through the ~~negligence~~ assault of* the City of New York and various agents, representatives and employees *or other persons, and the undersigned hereby gives you the exclusive right to take all legal steps to enforce the said claim and hereby further agrees not to settle this action in any manner without your written consent.*

In consideration of the services rendered and to be rendered by you, the undersigned hereby agrees to pay you and you are authorized to retain out of any moneys that may come into your hand by reason of the above claim:

(A) Fifty per cent on the first one thousand dollars of the sum recovered;

(B) Forty per cent on the next two thousand dollars of the sum recovered;

(C) Thirty-five per cent on the next twenty-two thousand dollars of the sum recovered;

(D) Twenty-five per cent on any amount over twenty-five thousand dollars of the sum recovered;

whether recovered by suit, settlement or otherwise.

Provided, that in the event extraordinary services are required you may apply to the Court for greater compensation pursuant to the provisions of subdivision (d) of Rule 4 of Special rules regulating the conduct of Attorneys . . . Appellate Division: First Department.

Dated June 18, 1962 *, 19* Harold Tolivier Jr. *(L.S.)*

Witness Henrietta Tolivier *(L.S.)*

Signatures

548C—Contingent Retainer—Sliding Scale—1st Dept., App. Div. C

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
80 EXCHANGE PLACE, AT BROADWAY, NEW YORK

Retainer

To CARL RACHLIN
Vladeck, Elias
280 Broadway

The Undersigned, residing at 522 McDonough St., Brooklyn

hereby retains you to prosecute or adjust a claim for damages arising from—personal injuries sustained by

loss of services of

property damage to

on the 28th day of April 1962 through the negligence of

the City of New York and various officers, representatives and employees

or other persons, and the undersigned hereby gives you the exclusive right to take all legal steps to enforce the said claim and hereby further agrees not to settle this action in any manner without your written consent.

In consideration of the services rendered and to be rendered by you, the undersigned hereby agrees to pay you and you are authorized to retain out of any moneys that may come into your hand by reason of the above claim:

(A) Fifty per cent on the first one thousand dollars of the sum recovered;

(B) Forty per cent on the next two thousand dollars of the sum recovered;

(C) Thirty-five per cent on the next twenty-two thousand dollars of the sum recovered;

(D) Twenty-five per cent on any amount over twenty-five thousand dollars of the sum recovered;

whether recovered by suit, settlement or otherwise.

Provided, that in the event extraordinary services are required you may apply to the Court for greater compensation pursuant to the provisions of subdivision (d) of Rule 4 of Special rules regulating the conduct of Attorneys . . . Appellate Division: First Department.

Dated June 26, 1962 Thomas Allen Daughtry (L.S.)

Witness Jane Daughtry (L.S.)

Signature

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

- -x

HENRIETTA TOLIVER and HAROLD TOLIVER, Jr.

Plaintiffs,

-against-

CITY OF NEW YORK

Defendant.

- -x

IT IS STIPULATED AND AGREED by the undersigned that Carl Rachlin, Esq. of 165 West 46th Street, New York, New York, be and he hereby is substituted as attorney for the Plaintiffs in the above entitled action in place and stead of Vladeck and Elias, Esqs.

Dated: New York, New York
~~February~~ March 12, 1964

Vladeck + Elias
Vladeck and Elias,
Attorneys for Plaintiff

Henrietta Toliver
Henrietta Toliver

Harold Toliver Jr
Harold Toliver, Jr.

Carl Rachlin
Carl Rachlin

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On the 12th day of ~~February~~ March, 1964, before me personally came HENRIETTA TOLIVER and HAROLD TOLIVER, JR., to me known and known to me to be the individuals described in, and who executed, the foregoing instrument and duly severally acknowledged to me that they executed the same.

Sheldon Engelhard

Sworn to before me this
12th day of ~~February~~ March, 1964.

SHELDON ENGELHARD
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-1117350 Queens County
Cert. filed in New York County
Term Expires March 30, 1961

114. Summons, Supreme Court, With N

10M 7-56
A ROBBINS PRODUCT

Rob Stationery Co., Inc., Law Blank Publishers
25 Warren Street, New York 7, N. Y.

Supreme Court of the State of New York
County of KINGS

HENRIETTA TOLIVER and HAROLD TOLIVER, JR.

Plaintiffs

against

CITY OF NEW YORK

Defendant

Plaintiffs designate Kings County as the place of trial.

Summons ~~with notice~~

RECEIVED
LAW DEPARTMENT
1963 JUN 3 PM 3 18
OFFICE OF
CORPORATION COUNSEL

To the above named Defendant :

You are hereby Summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint

Dated, May , 19 63.

VLADECK & ELIAS

Attorneys for Plaintiffs

Office and Post Office Address:
280 Broadway
New York 7, N. Y.

Plaintiffs' address:
522 McDonough Street
Brooklyn, New York

Affidavit of Service on Individual(s)

State of New York,
County of } *ss.:*

being duly sworn, deposes and says, that on the
day of *19* *, at No.*

he served the within Summons

on
the Defendant therein named, by delivering to and leaving a true copy of each thereof with said defendant personally; deponent knew the said person so served as aforesaid to be the same person mentioned and described in said summons
as the defendant therein; deponent is over the age of 18 years and not a party to the action.

Sworn to before me this
day of *19* }

Affidavit of Service on a Corporation

State of New York,
County of } *ss.:*

being duly sworn, deposes and says, that on the
day of *19* *, at No.*

he served the within Summons

a

a *corporation, the defendant therein named, by delivering to and leaving a true copy of each thereof personally with*

an officer of said corporation, to wit, its
deponent knew said corporation so served as aforesaid to be the same corporation mentioned and described in said summons
as the defendant therein, and knew said

to be such officer thereof; deponent is over the age of 18 years and not a party to the action.

Sworn to before me this
day of *19* }

N. Y. Supreme Court

COUNTY OF KINGS

HENRIETTA TOLIVER and
HAROLD TOLIVER, JR.

Plaintiffs

against

CITY OF NEW YORK

Defendant

Summons

To the Defendant

Notice is hereby given to you that, upon your default to appear, or answer the within summons, judgment will be taken against you for the sum of $.....
with interest from the.....
day of....., 19....., and with the costs of this action.

VLADECK & ELIAS

Attorneys for Plaintiff

Office and Post Office Address

280 Broadway
New York 7, New York

COMPTROLLER'S OFFICE
BOROUGH OF MANHATTAN

Date: 2/5/63.

C: 131-479
Tort No.: 89833
Comptroller's No. T- 178490

Claimant: HENRIETTA TOLIVER & HAROLD TOLIVER, Jr.

Attorney for Claimant: VLADECK & ~~ELLIAS~~ Elias ESQS.
280 Broadway,
New York 7, N.Y.

s/HT

For the Comptroller: PATRICK RYAN ESQ. 3398 WHS-X00

HENRIETTA TOLIVER, having been duly sworn, testified as follows:

BY MR. RYAN:

Q What is your name and address? A My name is Henrietta Toliver, I live at 522 Mc Donough Street, Brooklyn.

Q How long have you lived there? A Nineteen years.

Q How old are you? A Thirty-two.

Q Now your'e bringing a claim against the city is that right? A Yes.

Q On what date did this claim arise? A April 28, 1962.

Q About what time? A About nine o'clock.

Q At night? A Yes.

Q Where were you at that time? A On Patchen and Mc Donough Street.

Q Were you alone? A No.

Q How many people were with you? A Two.

Q Were they men or women? A Women.

Q Were they relatives? A No.

Q Would you tell us who they are? A Emma Heaton and Delores Bethen.

Q Do they live with you? A No.

Q Do you know where they live? A Yes.

Q

Q Would you tell us? A Emma Newton, lives at 516 Mc Donough Street and Delores Bethea lives at the Fabian Hotel.

Q How are you people walking or standing or what? Q Just coming from the laundry.

Q Did you have any packages with you? A No.

Q You were coming from the laundry? A Right.

Q Did you have any laundry? A I had left my clothes and put it in the washing machine in the laundry and on the way back home.

Q But this is about nine o'clock at night? A Yes.

Q Do you recall how the weather was at that time? A It was nice out.

Q Now on which of those streets were you walking before you reached the corner, Patchen or Mc Donough? A The laundry is located on Mc Donough Street and Patchen and the incident occurred on Mc Donough Street and Patchen.

Q Which one did you cross? A Patchen Avenue.

Q And you were on the other corner, is that right? A Yes.

Q Were you actually moving or walking when the incident started? A Well when I left out the laundry, I seen a crowd on the corner.

s/1+T

Q Now I want you to tell us what happened? A I seen a crowd on the corner, not a large crowd and a police officer. On my way coming over across the street, I noticed some boys were there so I looked and I seen one of the boys was my nephew. The policeman was standing near with his guns on and a night stick. I asked him " what was the matter", he told me to mind my business".

Q First I want you to tell me what your nephew's name is? A Herman Daughtry.

Q Does he live with you? A He lives in my building.

Q Does he live with his parents? A He's married.

s/1+T

Q How old is that nephew? A Nineteen years old.

Q Now you say that you saw the nephew apparently being held by a policeman in some fasion, is that right? A Yes.

Q Now in order for you to reach the policeman and your nephew, did you have to make your way through other people? A There was several people out there, I went over to see what was going on.

Q So that you had to make your way through the people to reach those two? A Well there was people out there I had to come over to and pass them the people to see.

Q There was a crowd there?

BY COUNSEL: She didn't say that.

Q Was there a crowd there? A There was about six people out there.

Q Now these six people were they standing in a kind of circle around the policeman? A No, they was away.

Q What were they doing? A Standing there looking.

Q Just watching? A Yes.

Q Now you went past those people to the policeman, is that right? A No, I didn't go to the policeman.

Q Where were you? A I went over where the crowd was, where there is about six or seven people there and I noticed one of the boys up against the wall was my nephew.

Q Now out of the crowd did you speak to the policeman? A What crowd.

Q You said crowd? A There was only six people.

Q Out of the six people did you speak to the policeman? A Yes, I did.

Q So that out of these six people the policeman must have heard you? A He did hear me.

Q And you said what? A I asked him "what was the matter"? He told me to mind my own business. I said, "that was my nephew up against the wall".

Q Then what happened? A He told me to step back and that is what I did.

Q And then what happened? A I wasn't, I didn't intend to go up there any closer, he had a night stick and a gun in his hand so I stepped back.

Q And then what happened? A There was one boy in a crowd, he was doing the talking to the policeman.

S/HT

Q Now ~~excuse~~ excuse me again, you have used the word crowd are you talking about the people who were watching, you have again used the word crowd are you talking about the people who were watching the policeman, is that who you mean?

BY COUNSEL: I object.

Q Do you mean in terms of crowd, do you mean the six or seven people who were there? A Yes.

s/HT

Q Now you said that another person apparently spoke out of this crowd ~~and elucidated the crowd your permision~~? A No, I didn't say that.

Q Who spoke one of the boys who was up against the wall? A He started to talk to the police officer.

s/HT

Q Now how many boys were actually under the control of the police? A Five boys.

Q Now there were five boys being held by the police is that right? A Yes.

Q And there was a group of six watching them is that right? A Yes.

Q Now the group of six were they mixed men and women? A Yes, I guess so.

Q And then you came is that right? A Yes.

Q You had two women with you is that right? A Yes.

Q Now then you spoke is that right, when you got there? A Yes.

Q And you spoke out of your group? A Yes.

Q Now after you spoke the police and he told you to mind your own business? A That is right.

Q Then did the other boys say something, one of the boys under custody? A No.

Q When did he say something? A The police officer was talking to him.

Q Was this your nephew? A No.

Q How many policemen were there? A One policeman controlling a group of five.

Q Controlling a group of five? A Yes, he was.

Q He was talking to who another boy? A Joseph Mc Caulley.

s/HT

Q What did his conversation with Mc Caulley have to do with you? A The other boy Joseph Mc Caulley, the police officer Matzel were talking. Mc Caulley boy asked the police officer why is they holding them. We respectable married men and we weren't disturbing anyone, the police officer said to the Joseph Mc Caulley to "shut your God dam mouth".

Q What happened after that? A After that all the boys begin to walk off he told them to walk to move off from the window, that they was up against the window of a store. Then he heard the police sirens out there that time my nephew had bent down and the police officer struck him.

Q Your nephew bent down? A That is right.

Q What for? A I don't know what he had, he had his mother's money she sent him to the store with two or three dollars to buy some spareribs.

Q How do you know? A I was there when my sister sent him to the store.

Q How do you know? A I was there when my sister sent him to the store.

Q Now he bent over is that right? A That is right.

Q What was he bending over for? A The money dropped that he had.

Q Now how did the money drop? A I didn't go to see how the money dropped.

Q So there is a policeman there.

BY COUNSEL: Not trying to hold.

Q Holding and your nephew dropped money, go ahead tell us some more; what else happened? A The police officer struck him.

Q He struck him when he bent over? A That is right.

Q What did he hit him with? A His night stick.

Q What else happened? A And I started screaming.

Q Why did you start screaming? A That was my nephew that the police officer was beating.

Q Did you know why your nephew was being held by the policeman? A No.

Q Nevertheless, you started screaming? A That is right.

Q What else happened? A He struck him again.

Q What else? A When the police siren,--when all the police cars came up thats when my nephew fell down because he had struck him the second time.

Q What else happened? A When he struck him again then I started screaming and the police officer was trying to keep me from hollering and he tried to push me in the car.

Q You mean while he's hitting your nephew he's also trying to control you? A No, there was about four car loads of policeman came up.

Q But all this happened before they came up? A Whats this.

A Yes. Q Your screaming and he's hitting your nephew?

Q Your saying that while he's hitting your--
A Well your putting words.

BY COUNSEL: She didn't say at all what counsel said she said.

{H.T. Q Now Mrs.,if I say anything like that you'll have to just excuse me.

(Off the record discussion)

Q Now were you still there when the patrol cars came? A Yes, I was.

Q Now the other four boys did they do anything when the policeman was striking your nephew? A No, they do anything.

Q They stayed right there is that right? A Yes.

Q Did any of the other people say anything when the policeman struck your nephew? A Yes, everybody was screaming in the street.

Q So that there was much noise during this, is that right? A Yes.

Q When the patrol cars came were those five boys taken into custody? A Two of them.

Q What about your nephew? A He was one of them.

Q Now what did you do when that was going on?
A I was screaming so the Police officers tried to push me inside the car.

Q What about the other people who were there?
A A couple of other boys got hurt too.

Q Your not answering me, what about the other people who were watching, did any of those people scream also? A A couple of them, I wasn't looking at nobody's faces to see who was screaming.

Q Now did the policeman say anything to you because you were screaming? A He told me to shut up.

Q Did you shut up? A I told him that was my nephew and why are they beating him up like that and he said "bitch get inside the car".

Q Were you arrested? A Yes, I was.

Q Now what is meant by the term"interfering" with a police officer? A I wasn't interfering with no one.

Q Now you're not answering me, do you know what is meant by that? A Yes.

Q Were you arrested? A Yes, I was.

Q Were you brought to a station house? A Yes.

Q Were you told why you were arrested? A I wasn't told anything.

Q Were you booked? A I guess I was, I was taken to court that night.

Q Now when you got to court did they tell you why you were arrested? A I never did hear the charge.

Q Did you have a lawyer? A ~~Yes, I did.~~ NO.

s/HT

~~Q Did he tell you? A Yes.~~

~~Q What did he tell you? A Resisting officer.~~

Q Now, were you held on bail? A Yes.

Q And afterwards was there a trial? A Yes.

Q What happened at the trial, I don't mean the details. What was the disposition? A I was found guilty.

Q And afterwards did you receive medical attention?

BY COUNSEL: Excuse me a minute, when you said afterwards when do you mean?

TO COUNSEL: Afterwards.

BY COUNSEL: After the trial your talking about?

TO COUNSEL: O'kay i'll go back to the beginning and ask.

Q Mrs., as a result of what happened are you making a claim for injuries of any kind? A Yes.

Q Are you making a claim for any assault? A Yes.

Q Now is the nature of your claim for assault the fact that you were forced into the motor vehicle is that one? A Yes.

Q Now also were you taken by the arm and brought into the station house? A No, I wasn't taken by the arm.

Q Now in the station house were you assaulted in any way? A Yes, I was.

Q Will you tell us what happened? A I was hand-cuffed to the pole and beaten to the floor.

Q Were you handcuffed and then beaten is that it? A Yes.

Q Now you were also handcuffed to some kind of pole is that what your saying? A Yes.

Q Were your hands in front of that pole or in back? A In the front.

Q Now when you were brought to the station house did you make any protest of any kind? A No, I was sitting on a chair and I noticed there was a mirror behind me and I felt my eyes and my mouth was all puffy and I got up to see my face.

Q Do you mean from crying or something? A No.

Q When you first were brought to the station house Mrs. did you make any protest? A No, I didn't.

BY COUNSEL: Counselor I think you better explain to her what you mean by a protest, you mean verbal is that what you mean about being taken there? You didn't ask that.

Q Now Mrs. in the first part when you were on the corner were you struck? A Yes, I was.

Q I'd like you to tell us the details of that, what you were doing , what the policeman was doing? A The police told me to get in the car.

s/HT

BY MR. RYAN: Let the record indicate at this point that the claiment is crying and I'd like to rest for a few minutes to compose yourself.

Q Now Mrs., I want you to think back to the time you were on the corner and when the police officer first came in the automobiles and tell us what happened to you from that point on as well as you can? A I was screaming andthe police officer was pushing me and telling me to shut up.

s/HT

Q Now excuse me again, what police officer? A I don't know.

Q This was one of the officers who came is that right? A Yes.

9 Q Go on now? A He told me to get in the car, I was getting in the car--police officer pushing me inside, my skirt fell down. I bent down to pick up my skirt and while I bent down to pick up my skirt the police officer got to beaten me with his night stick on my hip, I got inside of the car and the car [illegible] Donough Street. Turned around back out and went down Patchen Avenue, he got to call me all kinds of names, he called me "a black bitch". I told him his mother was a "bitch", she was a white one. He turned around and punched me in my mouth. Now the other one that was driving is the one that punched me in my m mouth

s/HT

The other police officer was on the right hand side, he started throwing a whole lot of names to me, called me all kinds of different things. That and the other one on the right hand side turned around and he started beating me up, he never did touch the boy next to me. I didn't even know there was somebody else in the car untill I actually got inside the car, Martin Byers and at that time he was beating me up and I was screaming in the car and they put the siren on and drove fast down on to the police station and took me to the desk there and then he took us all in the back room. Martin Byers and Herman Dorchman and my sister she went in-- He was asking our names so we were giving out names to the police officer and he didn't put me over where the other two boys were. H e told me to sit back like over there, so I was sitting over there in the chair and my nose was bleeding and everything and I felt my eyes all puffy and my mouth and there was a mirror right there up against the wall and I got up there from the chair to see my face in the mirror and this other police officer started beating me up, now the police officer that actually did all the beating to me not the one on the corner is two different polices involved there but I don't know the other police by name, that is all.

Q Now you said that they handcuffed you? A Yes, well I said that before.

Q But I want you to pick it up now? A And he told me you cant sit there so he took me and he handcuffed me to the pole and said you'll stay there so while they was doing that they handcuffed to the pole my nephew and the other police officer beat him up on the othe r side and this other police officer got to hitting me and as I got from the other side of the pole he beat me and he beat me untill I fell on the floor.

Q What happened after that? A They took us to 100 Centre Street, where I had chance to tell the judge what happened.

Q Did you tell the judge? A Yes, I did. I told him the only way that I can stop them from beating me, I told the police I was pregnant.

s/HT.

Q Now did the magistrate do anything at that time in relation to that claim? A Now I told him if I had to go back with those police officers I'd rather stay in jail.

Q Now you were released on bail that night? A Yes.

Q Did you go to see a doctor? A That night when we came home, that was about one o'clock that night.

Q No, at any time after that did you see a doctor? A Yes.

Q Where? A In my home.

Q Would you tell us that doctor's name? A Dr. Leroy Payne, 991 Herkimer Street, Brooklyn, New York.

s/HT

Q Mrs., did he prescribe any seditives? A He gave me a prescription.

Q Did you see him after that? A No, I had seen him to come to my mother and he asked me how was I doing, he came to my mother every two weeks.

Q How much did he charge your A Five dollars.

Q How much was the prescription? A Three dollars and ninety-five cents.

Q How were you afterwards attended by any other doctors? A I had been having a lot of trouble with my body inside lower part of my body and I was geting these pains in my inside and every part of me seems to be fallen out all the time and my husband tried to get me to go to the hospital and I told him I didn't want to go.

Q Did you go to a hospital? A Yes.

Q What hospital? A Kings County Hospital.

Q When? A December 4, 1962.

Q Now these pains that you speak of do you believe that they were a result of what happened with the police? A Yes, I never had them.

Q Did they keep you at Kings County Hospital? A Yes.

Q How long were you there? A Four days.

Q Now since then have you seen any doctors? A I went back to the hospital.

Q You were an outpatient, is that right? A When I went back to see the doctor yes, because they had took a biopsy and I went back to find out what was the result of that.

Q Have you seen any doctor since then? A No.

Q You don't know how much the bill was for Kings County, do you? A No.

TO COUNSEL: If you get that will you fill in the amount please?

BY COUNSEL: We will.

Q Now also Mrs., did you have a job at that time of the original insident? A No.

Q How much was the bail? A Twenty-five dollars.

Q Did you have to hire a lawyer? A Yes.

Q How much was his fee? A Two hundred and fifty dollars.

Q Now did you have any other expenses or losses besides those that you have just told us? A There's not other expenses but I had to stay in bed for about three weeks, and take hot baths three times a day.

s/HT

Q Now before you answer the next question I want you to wait for your attorney to give you permision, do you understand? A Yes.

Q Were you ever arrested before this?

BY COUNSEL: Objection.

Q Were you ever convicted of a crime before?

BY COUNSEL: Objection.

Q The next question Mrs. you have to answer do you understand? A Yes.

Q Did you ever have any trouble with those policemen before that happened to you? A No.

Q The precinct where you were taken is that the precinct which covers the place where you live? A Yes.

s/HT

Q Do you know the number of the precinct? A ~~18th~~ 81st Precinct.

Q Now Mrs. did you ever have a claim against the city before? A No.

Q Did you ever get home relief? A No.

(EXAMINED BY DR. PISTOCCHI)

s/ Henrietta Toliver

SWORN TO BEFORE ME THIS

29th DAY OF May , 1963.

SHELDON ENGELHARD
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-1117360 Queens County
Cert. filed in New York County
Term Expires March 30, 1965

HAROLD TOLIVER, having been duly sworn, testified as follows:

BY MR. RYAN:

Q What is your name? A Harold Toliver.

Q Are you the husband of Henrietta Toliver? A I am.

Q Did you hear your wife testify concerning her injuries and expenses? A I did.

Q Are they correct? A They are correct.

Q Were you a witness to the incident that she has just described? A No, I wasn't.

Q Were you present at the station house when she was brought there? A No, I wasn't.

Q Were you present at the Magistrates Court when she was brought there? A Yes, I was there.

Q Did you hear your wife complaining to the magistrate about having been beaten? A Yes.

Q Was she represented by an attorney at that time? A No, she wasn't.

Q Outside of what your wife has told you concerning what happened do you have any other knowledge of what happened? A Yes, I do.

Q Now is that knowledge, knowledge that you gained from speaking with other people? A No.

Q Do you have any knowledge of what happened of your own knowledge? A Yes, I do.

Q Would you tell us what you know of your own knowledge? A Well, I saw my wife chained to the floor, I mean to the pole.

Q That was at the station house? A Yes.

Q Where were you? A I wasn't there when she was brought there I was there afterwards.

Q Now I want you to tell us what you saw there when you got there? A Well I was about two blocks from the precinct myself, ~~and my father inlaw and my sister inlaw~~ to begin with the reason I wasn't at home at the time because I went to the restaurant to buy a couple of dinners for myself and my wife. I couldn't have been gone any more than twenty minutes, I heard all this disturbance was going on. I wondered what happened to my wife and they said they took her to the precinct with those boys. So I dropped everything and I ran to the precinct, I was about two blocks from the precinct and I could hear all of this screaming.

s/HT

Q Was your sister in-law with you? A No, my sister in-law wasn't with me because she was in the precinct.

Q Who was with you? A Who was with me, oh Delores, because I could hear this screaming of women's voices and I ran right in the precinct and my wife was laying on the floor and her blouse was tore off and she was handcuffed to the floor--I mean pole. So I asked her what right did they have to have my wife handcuffed to the pole? I took off my shirt and I gave her my shirt and I told them let her be decent. They did let me give her the shirt because she was still handcuffed to the pole, so they told me to get out of there before I get locked up and she had been in night court, so there wasn't anything else I could do except wait for night court to bail her out.

s/HT

Q The precinct is the ~~18th~~ 81st, is that right? A Yes.

Q Is that the Bedford Stuyvesant section? A Well all of that area is considered the Bedford Stuyvesant.

Q Did you ever have any trouble with those policemen yourself before? A Never.

Q What do you do for a living? A I'm a forman in the jewelery industry.

Q Did you ever have a claim against the city before? A No.

Q Did you ever get home relief from the city? A No.

TO COUNSEL: I'm getting an authorization for Dr. Leroy Payne.

(EXAMINED BY DR. PISTOCCHI)

s/ Harold J. Toliver, Jr.

SWORN TO BEFORE ME THIS

28th DAY OF May, 1963.

SHELDON ENGELHARD
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-1117360 Queens County
Cert. filed in New York County
Term Expires March 30, 1965

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

- X

HENRIETTA TOLIVER and HAROLD TOLIVER, JR.

Plaintiffs,

-against-

CITY OF NEW YORK

Defendant.

- X

Plaintiffs, complaining of the defendant, by their attorneys, VLADECK & ELIAS, allege:

FIRST CAUSE OF ACTION ON
BEHALF OF PLAINTIFF HENRIETTA TOLIVER

1. Plaintiff HENRIETTA TOLIVER has been and is a resident of the County of Kings, City and State of New York at all times hereinafter mentioned and is the wife of plaintiff, HAROLD TOLIVER, JR.

2. At all times hereinafter mentioned, the defendant CITY OF NEW YORK, was and still is a municipal corporation duly organized and existing under the laws of the State of New York.

3. Among the duties imposed by law upon the defendant, CITY OF NEW YORK, and provided by its Charter, was a duty to operate and control a Police Department wherein, among others, policemen were employed as servants, agents and employees of defendant and under its supervision and control.

4. That on or about April 28, 1962, while the said plaintiff was lawfully and properly on the public streets and sidewalks in the vicinity of the intersection of Patchen Avenue and McDonough Street, in the Borough of Brooklyn, City of New York, she was, on and about her head and body, without just or legal cause and provocation, wrong-

fully, maliciously, illegally and improperly, and by use of force and arms, set upon, beaten, ill-treated, mistreated and assaulted by agents, servants and employees of defendant, namely policemen who were members of the Police Department of defendant, who allegedly were acting in the course and performance of their duties within the scope of their authority and employment on behalf of defendant.

5. That the improper and illegal force and violence described above began about 9:00 p.m. on the said April 28, 1962 and continued for a period of several hours thereafter; the said assault, battery, illegal and wrongful acts commenced on the public streets and sidewalks in the vicinity of McDonough Street and Patchen Avenue, both in the County of Kings, Borough of Brooklyn, City and State of New York, and then continued in a police vehicle, which upon information and belief, was owned and operated by the said defendant CITY OF NEW YORK; that during such time plaintiff was being improperly and forcibly taken to the Police Precinct located at 16 Ralph Avenue, known as the 81st Police Precinct, in the Borough of Brooklyn, County of Kings, and such assault, battery, illegal and wrongful acts continued thereafter at the aforesaid 81st Police Precinct; that all during the times aforesaid on the date referred to, in the Police vehicle referred to and in the 81st Police Precinct, the said plaintiff was illegally, improperly and unjustifiably arrested, imprisoned and mistreated, abused, beaten and numerous batteries were committed upon her person and that said acts were done without just or legal cause and provocation.

6. That said assault by the defendant , its servants, agents and employees was done maliciously, wrong-

fully, recklessly, unreasonably and illegally, was unprovoked and unjustified and occurred without any fault on the part of the plaintiff.

7. That as a result of the foregoing, plaintiff was made sick, sore, lame and disabled and sustained shock and numerous serious injuries, bruises, tenderness, ecchymosis, hematoma and the like on and about her head and body.

8. That in addition thereto, the defendant, its agents, servants and employees falsely arrested and accused the said plaintiff falsely and improperly imprisoned and detained her, all in violation of law; that as a result thereof said plaintiff was deprived of her liberty and the said arrest was in violation of the Constitution of the United States and the State of New York and deprived plaintiff of due process of law.

9. As a result of the injuries to plaintiff, as aforesaid, plaintiff was forced to remain in bed and was confined to her home for a substantial period of time and was unable to perform her duties as wife of the plaintiff, HAROLD TOLIVER, JR., and as mother to their children.

10. That thereafter and on or about July 25, 1962, and within 90 days after the claim herein sued upon arose, and prior to the commencement of this action, the said plaintiff, as claimant, caused a notice of claim in writing, sworn to by or on behalf of her, to be served upon the defendant, CITY OF NEW YORK, in duplicate, by delivering the same personally to the Comptroller of the said defendant. Said notice of claim set forth the name and post office address of the claimant and her attorneys; the nature of her

claim; the time when, the place where and the manner in which her said claim arose; and the items of damage or injuries claimed to have been sustained by the said plaintiff so far as then practicable.

11. That more than 30 days have elapsed since such claim was so presented to defendant and the defendant has neglected and refused to make any adjustment or payment thereof for 30 days after such presentment.

12. That this action has been commenced within one year and ninety days after the happening of the event upon which the claim was based.

13. That by reason of the premises, the said plaintiff has been damaged in the sum of $100,000.00.

SECOND CAUSE OF ACTION ON
BEHALF OF HAROLD TOLIVER, JR.

14. Said plaintiff repeats and realleges each and every allegation contained in paragraphs numbered "1" through " 9 " of this complaint as if specifically set forth herein.

15. That as a result of the improper, illegal, unjustified and brutal assault, arrest and imprisonment of plaintiff, HENRIETTA TOLIVER, wife of the said plaintiff, HAROLD TOLIVER, JR., plaintiff HAROLD TOLIVER, JR., has been obliged to and did expend sums of money for medical care, medicines and the like; that he has been deprived of the comfort and services of his wife, plaintiff HENRIETTA TOLIVER; and that she has been unable to perform all her duties and responsibilities both to plaintiff HAROLD TOLIVER, JR. and to and for their children.

16. That thereafter and on or about July 25, 1962, and within 90 days after the claim herein sued upon

arose, and prior to the commencement of this action, the said plaintiff, as claimant, caused a notice of claim in writing, sworn to by or on behalf of him, to be served upon the defendant, CITY OF NEW YORK, in duplicate, by delivering the same personally to the Comptroller of the said defendant. Said notice of claim set forth the name and post office address of the claimant and his attorneys; the nature of his claim, the time when, the place where and the manner in which his said claim arose; and the items of damage or injuries claimed to have been sustained by the said plaintiff so far as then practicable.

17. That more than 30 days have elapsed since such claim was so presented to defendant and the defendant has neglected and refused to make any adjustment or payment thereof for 30 days after such presentment.

18. That this action has been commenced within one year and ninety days after the happening of the event upon which the claim was based.

19. That as a result thereof and as a result of the illegal arrest, imprisonment and improper assault committed upon the said plaintiff HENRIETTA TOLIVER, the false arrest and false imprisonment of the plaintiff HENRIETTA TOLIVER, plaintiff HAROLD TOLIVER, JR. suffered injury and incurred expenses in retaining counsel and otherwise to his damage in the sum of $10,000.

WHEREFORE, plaintiff HENRIETTA TOLIVER demands judgment on the first cause of action in the sum of $100,000.00 and plaintiff HAROLD TOLIVER, JR. demands judgment on the second cause of action in the sum of $10,000.00, together with the costs and disbursements of this action.

VLADECK & ELIAS
Attorneys for Plaintiffs
Office & P. O. Address:
280 Broadway
New York 7, New York

jr-3

JUN 20 1963

Copy Received

By Mail 6/20/63

VLADECK & ELIAS

Attorneys for Plaintiff

SUPREME COURT : KINGS COUNTY - - - - - -x

HENRIETTA TOLIVER and
HAROLD TOLIVER, JR., Plaintiffs

-against-

THE CITY OF NEW YORK

Defendant

Reg. 505 Folio 199

- -x

S I R S :

PLEASE TAKE NOTICE that you are required, within ten days after the service of this notice upon you, to serve upon the attorney for the defendant, The City of New York, a verified bill of particulars setting forth in detail the following particulars, pursuant to Rules 116 and 117 of the Rules of Civil Practice:

1. The date and approximate time of the day of occurrence;
2. The location of the alleged occurrence;
3. What the plaintiff was doing at the time of the alleged assault and arrest, together with the facts and circumstances leading up to the alleged assault and arrest;
4. The name or names and addresses of anyone who was present at the time of the alleged assault and arrest;
5. A detailed statement of the injuries allegedly sustained by the plaintiff, and a description of those claimed to permanent;
6. The nature of employment of the plaintiff at the time of the alleged assault and arrest and the time lost from said employment, if any;
7. Name and address of employer of the plaintiff;
8. Total amount claimed as special damages for (a) physicians' services and medical supplies; (b) loss of earnings; (c) hospital expenses; (d) nurse's services; (e) legal and other fees.
9. A detailed statement of any and all other damages claimed.

Dated: New York, N. Y.
June 18, 1963.

Yours, etc.,

LEO A. LARKIN
Corporation Counsel
Attorney for Defendant
The City of New York

Office & P. O. Address
Municipal Building
Borough of Manhattan
New York 7, N. Y.

TO: VLADECK and ELIAS, Esqs.,

Attorney for Plaintiffs,

280 Broadway,
New York 7, N. Y.

Pers file

MEMORANDUM FROM
CARL RACHLIN

TO:

Tel No
Z
GL-3-4000

for the vicinity of
McKlosky St bldg
& in the 81st Precinct

jr-4

Copy Received
By Mail 6/24/63
ECK & ELIAS
Attorneys for Plaintiff

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

- x

HENRIETTA TOLIVER and
HAROLD TOLIVER, JR.,

Plaintiffs,

-against-

CITY OF NEW YORK,

Defendant.

- x

The defendant, The City of New York, answering the complaint herein, upon information and belief, alleges:

AS TO THE FIRST CAUSE OF ACTION ON BEHALF OF THE PLAINTIFF, HENRIETTA TOLIVER:

FIRST: Denies having any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph of the complaint designated "1".

SECOND: Denies each and every allegation contained in paragraph of the complaint designated "3", except that The City of New York maintained a police department pursuant to the Charter and the Administrative Code of The City of New York.

THIRD: Denies each and every allegation contained in paragraphs of the complaint designated "4", "5", "6", "7", "8", "9" and "13".

FOURTH: Denies each and every allegation contained in paragraphs of the complaint designated "10", "11" and "12", except that on or about the 25th day of July, 1962 and prior to the commencement of this action, a notice of claim was presented to the Comptroller of the City of New York, and that more than thirty days have elapsed since such presentation and

that no adjustment thereof has been made; and that this action was commenced within one year and ninety days after its alleged accrual.

AS TO THE SECOND CAUSE OF ACTION ON BEHALF OF THE PLAINTIFF, HAROLD TOLLIVER, JR.:

FIFTH: Denies each and every allegation contained in paragraphs of the complaint designated "14", "16", "17", and "18", except as otherwise pleaded herein.

SIXTH: Denies each and every allegation contained in paragraphs of the complaint designated "15" and "19".

AS A FIRST, SEPARATE, COMPLETE AND DISTINCT DEFENSE TO THE CAUSES OF ACTION SET FORTH HEREIN, AND IN JUSTIFICATION THEREOF, THE DEFENDANT, THE CITY OF NEW YORK, ALLEGES:

SEVENTH: That at all the times mentioned in the complaint the defendant, The City of New York, maintained and operated a Police Department as provided by law and that the police officers attached to said department are obliged to detect and suppress crime and to apprehend and arrest offenders against the Penal Laws of the State of New York.

EIGHTH: That at no time did the defendant, The City of New York, or any of its police officers commit any of the acts alleged in the complaint, but if it be determined that any of its police officers did commit any of the said acts and if it be determined that such acts were committed within the scope of their employment as police officers, then all such acts of the said police officers, were performed without malice and with reasonable and probable cause in the performance of their duties as police officers in the Police Department of The City of New York.

FOR A SECOND, SEPARATE AND PARTIAL DEFENSE AND IN MITIGATION OF DAMAGES, IF ANY, THE DEFENDANT, THE CITY OF NEW YORK, ALLEGES:

NINTH: Repeats and realleges each and every allegation contained in the paragraphs of this answer designated "SEVENTH" and "EIGHTH".

TENTH: That at no time did the defendant, The City of New York, or any of its police officers commit any of the acts alleged in the complaint, but if it be determined that any of its police officers did commit any of the said acts and if it be determined that such acts were committed within the scope of their employment as police officers, then all such acts of the said police officers, were performed in good faith and without malice in the ordinary course of their duties as police officers in the Police Department of The City of New York and as peace officers of the State of New York.

WHEREFORE, the defendant, The City of New York, demands judgment dismissing the complaint herein, with costs.

LEO A. LARKIN
Corporation Counsel
Attorney for Defendant
The City of New York
Office & P.O. Address
Municipal Building
Borough of Manhattan
City of New York, 7.

November [illegible]

Mr. and Mrs. Harold Zeliger
323 McDonough Street
Brooklyn, New York

Re: Zeliger v. City of New York

Dear Mr. and Mrs. Zeliger:

This is to advise you that the City's examination of your [illegible] will take place on November 15, 1962 at 9:00 a.m. In order that we may meet and be on time for the hearing, I ask [illegible] meet me at my office at 8:45 that morning.

If you have any hospital records, bills or any other [illegible] pertaining to your claim, please bring them with you.

Your cooperation in this matter will certainly be appreciated.

Very truly yours,

TLAMSOK & ELIAS

BE:sy

By: SHELDON ZUCKERMAN

Sal. Lewis Mfg. Company

Sal. Lewis Mfg. Company

To WARNOCK & ELIAS, have this day received from Scottish Weaver $100 in cash.

Jeanette Pohl
Secretary Treasurer

WARNOCK & ELIAS
By Stanley Lyons

November 1,

MEMORANDUM

TO: Mr. Carl Machlin

FROM: Mr. Sylvan Elias

Re: Tolibor vs. City of New York and Daughtry vs. City of New York

I believe that you should examine the [illegible] of New York [illegible] POLICEMAN INVOLVED before trial in the above matters. Under [illegible] new CPLR it is no longer necessary to obtain a court order [illegible] amine a public corporation, but notice is sufficient. The [illegible] is a simple one--see CPLR rule #3107 and sections prior to [illegible] following.

SHE:bac

Beutand Prudich

never arrested before

Herman Daughtry Jr.
522 McDonough St.
Married, Brenda
2 children Veda
Herman III

April 28th
on way to butcher at Reid
Decatur
passed house of friend with
2 others Aaron Mahaulley
~~Martin~~ with him was
Martin Byers
Victor Matthias
This is 508 McDonough
South side of McDonough
this house is one city length
from the corner of Hatcher
near the South West corner
of Hatcher & McDonough
about 9:15 PM or so
asked them to go to store with him
policeman came over & told them
to move on. Aaron said he lives
there

Cop cursed & said "Nigger"
Aaron refused to move - because
kids were alone
Herman & Cynthia (neighbor

herd girl started around come
policeman came
asked him "where do you
think you are going?"
"I am going to the Stars"
"Are you a nut"
Cop shoved Herman out
his patrol against wall
The others came around come
also, cop told them to
get against wall also
(Orlatchen Ave)

cop cursed them -
Aaron kept saying his kids
were alone
Cop kept cursing - took
out gun
hit Herman on forehead -
hit him several times then
more police cars came
Herman had staggered
around the car
got kicked again

A colored policeman came -
knocked his wife down - so Herman
wife, mother got in colored policeman's
car. - Got hit by Mexican again

cop cursed
another
Mexican

Got Lyck.

Aunt
Byers
Daughtry

all in
one room

Saw her Aunt's clothes
torn off
another Officer came over
Some more fighting in the cabin
Aunt handcuffed to
pole
she was being beaten

Daughtry Disorderly Conduct
cleared again
Also charged with Assault
$500.00 bail

Byers — just disorderly conduct
also thrown out

Aunt — interfering with arrest
no trial yet

Here then we started beating the —
Aunt screaming — she kept telling

them she was pregnant.

Another policeman came over & asked what happened seemed friendly — one of the other cops ~~pen~~ told him he interfered

Herman got beaten again Mother sent this

Cop also ~~through~~ threw chair at you Brother took into his own chair

Doctor came in & treated him

He was beaten so bad he taken to night court — Judge tells them to give him medical treatment

then to Jail house in Atlantic City.

Was in jail overnight

Finally bailed out. police never made his call

Bikur Jewish Hospital took X Rays

No fractures
doctor Dr Terry Daine has

Mrs. Henrietta Toliver

April 28th - approx 9:15 pm

- cool Nicks in 2 & every day.

- when on corner going ~~to~~ Family 2 Patchen & Nan Bronx Ave (Son works there) saw cop with nightstick & pistol holding 4 boys against wall. T's nephew stuck on head with nightstick - ~~one~~ 3X all toilet. neph. fell on ground & cop kicked him. H started scream.

Before the blows T told cop she was boys aunt & cop said mind your business & T said boy was her nephew & wanted to find out what happened.

When T screamed other police came, about four cars.

After 2 cops came one of cops hit Martin Reyes with stick on chest & pushed him in back seat of car.

Then one cop pushed T & tore T's blouse & then pushed

her into car & her skirt fell down. When trying to pull skirt up 3 police started to beat T with clubs across shoulders & arms when bent over.

Her car police called T names & T said its a damn shame & cop pounded T in face.

cop who drove

T screamed & cop passenger in front seat slapped T.

At 87th pct. Taken in book, Martin Byrne, Herman Daugherty (negroes 19yr). In back room negroes was bleeding from head & K. ~~Bot~~

Cop told T to get up from one chair & move to another chair. A mirror in room so T went to ~~the~~ see what she looked like. Cop said "you can't set still" & then handcuffed her to a post. & cussed her out.

A play on words. Then cop hit her with nightstick & other cops hit the nephew.

Nephew was arrested for assault & DO. – case dismissed 5/22/
Adolescent Ct. (DO) 62nd pct & Snyder Ave.

II taken to 100 Centre St. – held on $20 cash bail (interfering with offer plus DO & assault)

witnesses in police station
Jane Doughty Petty (same address) II sister
Mr. Robt. Toliver
Alan Lawrence father of II
Samuel Lawrence brother of II

– called ambulance & attendant dressed the wound (White Lough Ambul. Hospital)
– nephew locked up instead of medical treatment for nephew. @ Centre St. (fractures)

Toombs, Claire vs Salsbery, Don G.
(Car Accident)

Sept. 1964 – July, 1965

Box 43
Folder 24

rical Society of Wisconsin

Please Retain Original Order

9/1/64

Claire Toombs
345 Broadhurst Ave
Hawthorne
914 - RO-9 - 1057
Office No. - PL-7-4970
Passenger in car - July 12th 3-4:00 AM
Don G Salsbery driver
also owned
~~to~~ 64 Olds?

Ins Adj'r Thos M Grimes
M. L. Gresham & Co
312 Las Vegas Blvd N.

Salsbery is a resident of
Nevada - Las Vegas
works for 2 BM 2209
Las Vegas Blvd So. - Salesman
in Las Vegas

Accident outside of Las Vegas
Driver going to fast - possible
pad tire - went around turn
too fast - car went off road.
She was knocked unconscious
Came to - lying on seat
Pain in head - very intense
Bad pain subsided - bad headache

remained. She fainted again.
Rt arm & Rt shoulder
badly hurt — right knee
scar on elbow — right

Rt shoulder hurt until this
week — pain had spread
to neck & reach on left side
hurts

Taken to Las Vegas doctor (Dr Bauer / Bower)
about 12 hrs later. —
Name unknown. Didn't seem
to bad then but Rt arm
very bad — didn't think
about head

Told Dr she had been
unconscious — but never checked
for concussion — X Rayed
arm, shoulder & neck — all
negative as to breaks

Taken back to Hotel — Tally
(Wo) — his Boy's arrive
on Wed day — she wrote an
account of accident. Agreed
to pay her medical bills.
Doesn't believe she signed

a release, but gave rights to back to Dicks.

At this time she was feeling bad.

Left for Vegas on Wednesday. Thursday her mother took her to doctor who said she had a concussion — Dr Eleman in Hawthorne

Returns breakdown next week — to a rest home in Reno Halcyon Rest Home.

Was in a week ago on Sunday & came out on Saturday.

Has previous nervous breakdown — but was started beginning depression had screaming fits — at brother's 10 days before going to hospital.

Had been going to psychiatrist previously for some time. He called him before she went out with Sabotag. Psych had guard break into room

She is seeing him tonight.
Will call, tell me

UNITED SERVICES AUTOMOBILE ASSOCIATION

USAA BUILDING
SAN ANTONIO, TEXAS 78215

AIR MAIL

Mr. Carl Rachlin
Attorney at Law
165 N. 46th Street
New York, New York 10036

OCT 5 - REC'D

COL. CHARLES E. CHEEVER, U. S. A., RET.
PRESIDENT

COL. A. T. LEONARD, U. S. A., RET.
VICE PRESIDENT

COL. C. G. SCHENKEN, U. S. A., RET.
VICE PRESIDENT-TREASURER

M. C. KERFORD, VICE PRESIDENT-SECRETARY

COL. JACK H. GRIFFITH, U. S. A., RET.
VICE PRESIDENT, UNDERWRITING

WADE V. GRING, VICE PRESIDENT-COMPTROLLER

MAX H. WIER, JR., VICE PRESIDENT, CLAIMS

MAX H. WIER, SR., VICE PRESIDENT EMERITUS
GENERAL COUNSEL

October 2, 1964

RE: Claim No. 4-W-25 84 38-9
Capt. Don G. Salsbery, AFRES
Date of Loss: 8-10-64
Place of Loss: Searchlight, Nevada
Gresham File No. 648-72
Claimant: Claire Toombs

Dear Mr. Rachlin:

Our Las Vegas representative, R. L. Gresham and Company forwarded your letter directed to our assured on September 18, 1964, pertinent to above caption.

Our New York City representative, Crawford and Company, 116 John Street is handling this matter on our behalf. Please direct any further correspondence to them. Your cooperation will be appreciated.

Very truly yours,

WESTERN CLAIMS DISTRICT

W. M. Glover
W. M. GLOVER

WMG:re

CC: Crawford and Company
116 John Street
New York City, New York

CC: R. L. Gresham & Company
312 Las Vegas Blvd., North
Las Vegas, Nevada 89101

3411 Spring St
Philadelphia

Dear Mr. Rachlin,

SEP 21 1964

I called CORE before leaving last week, but in case you didn't get my message I thought I'd write this note.

The only new developement I have to report is that I had a very severe headache for two + a half days, as bad as they were the first week. Today it has gotten better otherwise I was planning on going to see my doctor in New York this weekend.

Otherwise I'm well, and kept quite busy with unpacking etc.

Please let me know what the insurance Co. has to say.

My phone # is EV 6-7271 –

10/16/64

Dear Mr. Rachlin,

I'm quite curious about what's going on – if you've received an answer to your letter or not etc. I'm sure you'll let me know when any developements occur but I'd appreciate a note anyway.

My health is improving somewhat and I'm working now. I still have headaches etc. but I suppose they'll be with me for awhile.

OCT 19 1964

Best regards
Claire Toombs

October 27, 1964

Miss Claire Toombs
3411 Baring Street
Philadelphia, Pennsylvania

Dear Claire,

I spoke to the insurance company representative this morning. Can I have a current medical statement as to your injuries as a result of the accident, plus the prognosis, together with an itemization of the actual expenses incurred by you or any member of your family on your behalf?

Sincerely yours,

Next time I'm in here
Luz I'll give you a call.

Sincerely,
Claire Toombs

HOURS: BY APPOINTMENT
ROGERS 9-0268

ALLAN H. LIND, M.D.
DANIEL CLYMAN, M.D.
294 FORT WASHINGTON AVENUE
HAWTHORNE, NEW YORK

Mrs. Connie Toombs
345 Bradhurst Avenue
Hawthorne, N. Y.

DATE	PROFESSIONAL SERVICE		CHARGE	PAID	BALANCE
7-28-64	HCD & Inj		10.00		10.00
7-30-64	OV		5.00		15.00
	X Chest (2)		15.00		30.00
8-4-64	OV		5.00		35.00
8-6-64	OV		5.00		40.00
8-15-64	Neuro. PX	Claire	10.00		50.00
8-18-64	OV	"	7.00		57.00
8-21-64				30.00	27.00
8-22-64	Inj	"	5.00		32.00
8-28-64	OV	Connie	5.00		37.00
9-11-64	OV	"	5.00		42.00
	X Chest (2)	"	15.00		57.00
9-15-64				37.00	20.00

PAY LAST AMOUNT IN THIS COLUMN

C - Consultation
OV - Office Visit
HCD - House Call Day
HCN - House Call Night
PT - Physiotherapy
CPX - Complete Physical Examination
GI - Gastrointestinal Series
EKG - Electrocardiogram
GB - Gall Bladder Series
FL - Fluoroscopic Exam
SIG - Sigmoidoscopy
IV - Initial Office Visit
X - X-Ray
BE - Barium Enema
HC - Hospital Care
INJ - Injection

TEL. WOODBINE 7-4567

Halcyon Rest Hospital

754 BOSTON POST ROAD
RYE, NEW YORK

FOR Claire Toombs DATE 8/29/64

Make checks payable to HALCYON REST HOSPITAL

Balance due from previous statement		
Hospital Care From 8/23 to 8/29	175	00
Therapies ..... Ect's. ..... Insulin		
Medication	6	15
Laundry		
Telephone		10
Cigarettes	2	40
Transportation taxi to Dr. Wald & return	3	00
Consultations & EKG Dr. Edelman	35	00
~~Occupational Therapy~~ X-Ray Dr. Wald	25	00
Laboratory		
Miscellaneous coke & candy		30
Amount due	246	95
Paid on account 8/24	50	00
Balance due	196	95

Received Payment: in full

DATE 8/29/64 By J. Buhrmann

HALCYON REST HOSPITAL
754 BOSTON POST ROAD
RYE, N. Y. 10580

PLEASE NOTE:

Bills are payable in advance; no refund during first 15 days, prorata thereafter.

HALCYON REST HOSPITAL accounts must be settled in full before departure of Patient.

HALCYON REST HOSPITAL will not be responsible for property of Patients or Visitors unless deposited in Property Box.

MISSISSIPPI FREEDOM DEMOCRATIC PARTY

P. O. BOX 1329
JACKSON, MISSISSIPPI - 39203
Telephone: (601) 352 - 9788

Washington Office:
1353 'U' STREET, N. W.
WASHINGTON, D. C. - 20009
Telephone: (202) 332 - 7732

January 9, 1965

Mr. Carl Rachlin
CORE
38 Park Row
New York, N.Y.

Dear Mr. Rachlin:

I am very confused about what you are doing now. The few things I hear are from my sister and mother, such as you don't think that the case can be handled out of court, and you want an itemized report of doctor bills etc. First of all aren't you supposed to get this information directly from the doctors involved? And exactly what are we asking for? Just my expenses (which include a lot more than medical bills) or are we asking for a large sum of money?

I really feel uneasy about my lack of information, because I feel that I should be able to collect several thousand dollars unless their is something happening that I'm not aware of, and if so I think I should be. Did you find out if I had signed a release, and if so what baring does that have on the case? I've written you a couple of letters in the past months, and haven't received an answer. I would very much appreciate your acknowledgeing this one.

Sincerely,

Claire Toombs

Claire Toombs

P.S. I receive mail at the MFDP office, 1353 U St. N.W. Washington, D.C.

CONSTANCE TOOMBS
345 BRADHURST AVE.
HAWTHORNE, NEW YO

NOV - 3 REC'D

Dear Mr. Rachlin

My Daughter, Claire Toombs, has asked me to write you a statement of her medical expences as a result of her accident.

Halcyon Hospital - $246.95
Dr. Clyman - 22.00
Prescriptions - 14.00

the diagnosis was Concussion, sprained shoulder and neck and nervous shock. She lost her job and has been unable to work. Prognosis, good.

If there is any other

please let me know.

Sincerely yours

Constance Toombs

January 15, 1965

Miss Claire Toombs
c/o Miss. Freedom Democratic Party
1353 U St. N.W.
Washington, D.C.

Dear Miss Toombs,

I have your letter of January 9th. I must confess I don't understand the tone of your letter but I will do the best I can to answer your question and also tell you why I spoke to your sister several weeks ago.

I do not know whether you signed a release and I have not asked them at this point because I do not wish to put the thought in anyone's mind that a release exists. If there had been one, I feel sure they would have referred to it by now, and so I have deliberately not mentioned it.

I am asking them in my conversations for a substantial amount of money, obviously not only for your doctor's bills and out-of-pocket expenses, and I don't know where you got the thought that I was limiting myself to these expenses and I have never said this to anyone. However, the insurance company has a right to know what the actual expenses are as distinct from your pain and suffering. This is perfectly routine.

As to the doctor's statements, I asked your sister to speak to the doctor since I assumed your family was friendly with the doctor, to give me a detailed statement of your injuries and the follow-up. Your mother had sent me a statement of the hospital bill and merely mentioned a Dr. Clyman, but nothing else about him or where to reach him. This is what I discussed with your sister and she promised to get this for me.

Obviously, if I were going to try to settle for you on a substantial sum of money, we have got to show a medical basis for it and only a doctor can give us this information. Please let us have this information or where I can get it and I will proceed accordingly.

Very truly yours,

Carl Rachlin
General Counsel

CR:hdl

AREA CODE 914 GR 6-1159

M. VICTOR DI FEDE
Counsellor - at - Law

FEB 23 REC'D

711 YONKERS AVENUE
YONKERS, NEW YORK 10704

February 22, 1965

Carl Rachlin, Esq.
165 West 46th Street
New York City, New York

Re: Clair Toombs Case

Dear Mr. Rachlin:

I have been consulted by Constance Toombs of Hawthorne, New York to look into and possibly institute a claim on behalf of her daughter Clair Toombs for personal injuries sustained by her on the _____day of _____, 196__, while she was a passenger in an automobile in the State of Nevada.

I understand that you have some papers in your possession that may assist me in this matter.

Would you be kind enough to forward to me whatever papers you have and also advise as to any progress made in this matter.

If you would like to continue with this matter, would you kindly call me at my office.

Very truly yours,

M. Victor Di Fede

M. Victor Di Fede

MISSISSIPPI FREEDOM DEMOCRATIC PARTY

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WASHINGTON, D. C. - 20009
Telephone: (202) 332 - 7732

FEB 2 5 1965

February 24, 1965

Carl Rachlin
CORE
38 Park Row
New York, N.Y.

Dear Mr. Rachlin:

Sorry about missing you while I was in New York. When I decided to go (at the last minute), I had forgotten that Monday was a holiday. It was important that I returned to Washington by Tuesday, hence, no contact.

My suggestion is that you make the appointment at what you feel is a convenient time, let me know in advance, and I'll do my best to be there. Is it possible to do this through a doctor in Washington?

I called my Mother last week, after speaking with you, and told her how urgent it is to get the doctor and hospital reports to you quickly. If you don't receive them shortly, why don't you give her a call, as to the reason. It would save time that way rather than going from you to me to her etc. Her number in Hawthorne N.Y. is ROgers 9-1057. Address: 345 Bradhurst Ave. Hawthorne, N.Y.

This case is important to me because I plan to go to school on the money I collect, and working in the Movement, I can never hope to be able to save a sufficient amount. I know this is not the kind of case you usually handle, and don't want to hang you up on it if it is bother-some to you. But this is something only you know, and I can just hope you would be honest with me about your feelings.

Thanks, and I'll be waiting to hear from you.

Freedom,

Claire

Claire Toombs

MISSISSIPPI FREEDOM DEMOCRATIC PARTY

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JACKSON, MISSISSIPPI - 39203
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Washington Office:
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WASHINGTON, D. C. - 20009
Telephone: (202) 332 - 7732

March 3, 1965

MAR 5 1965

Mr. Carl Rachlin
CORE
38 Park Row
New York, N.Y.

Dear Mr. Rachlin:

I received a letter from my Mother saying that Dr. Clyman was out of town, but expected to be back by March 1st. If so you should be hearing from him soon. She also said that the hospital would not give any information out unless I signed a statement releasing exactly what information I wanted given to a certain person.

I'm not certain what information I should say I want released, the hospital being the type it is, so if you would tell me or if it would be better, write the letter yourself, send it to me to sign and forward. What ever you think best.

With best wishes,

Freedom,

Claire

Claire Toombs

SPEED LETTER

TO: Mr Carl Kachlin
165 West 46 St
NYC, N.Y.

FROM:

CRAWFORD AND COMPANY
TELEPHONE: (212) BE 3-7767
116 JOHN STREET
NEW YORK, NEW YORK 10038

FOLD

SUBJECT	ENCLOSURE(S)	DATE
Claire Toombs	3	2/15/65

FEB 16 REC'D

Dear Sir:

Supplementing our telephone conversation of this date.

We are attaching Medical Authorization Forms which we would like to have signed by your client, Claire Toombs in order that we might obtain the Hospital records. We would prefer to review these records prior to assigning a physician to examine Miss Toombs.

FOLD

Your attention in this matter is appreciated.

Paul Stockschlaeder

Authorization Forms Return envelope

IF THERE IS ROOM — use it for your reply.

MEDICAL AUTHORIZATION

TO: Any Attending Physician or Hospital

This, or any photostatic copy hereof, will authorize you to furnish the bearer with full reports on the condition of _____ including history, findings, prognosis, and medical expenses.

DATE: _____ S/ _____

Form No. RF 166

4/1

March 16, 1965

Miss Claire Toombs
c/o Miss. Freedom Democratic Party
1353 U Street, N.W.
Washington, D.C.

Dear Claire,

I would like to help you obtain a reasonably good settlement on your accident case but I don't see how I can unless I obtain the medical information. Only you can get this information, no doctor or hospital will give it to me unless you authorize it specifically, since it is personal to you. Without it a settlement can only be small. If they do not settle voluntarily and there is go guarantee that any insurance company will settle voluntarily, even with this information, and a lawsuit would be brought in Nevada, this information would have to be made available to the court or, similarly, you would not be able to get a good verdict from the court or a good settlement during the course of the trial. In other words, the information is sorely needed.

I hope to hear from you.

Sincerely,

Carl Rachlin
General Counsel

CR:hdl

2 2 1965

c/o Mississippi Freedom Democratic Party
1353 U Street N.W.
Washington, D.C.
March 20, 1965

Mr. Carl Rachlin
CORE
38 Park Row
New York, New York

Dear Mr. Rachlin:

Enclosed you will please find a copy of my letter of March 3rd, 1965 to you which answers the questions in your letter of March 16th, 1965.

In your letter you asked me to get information from the hospital about the extent of my injuries but in my letter I had already stated that I must tell the hospital specifically what information I need and only you, as my attorney can tell me that. I imagine there are certain things that you must know in order to present my case well in court.

I would like to ask you two questions about my case:

1. What is the state of my case? What steps have you taken? What action do you plan and when? Who am I suing? Will the suit be filed in a State or Federal Court?

2. Could you state the specific nature of my agreement with you? What do you understand as my obligation to you and yours to me financialy and other wise.

Because of the lack of communication and understanding, I feel this letter is of great importance, and if I do not hear from you in ten days I will have to assume that there is no agreement between us, and you do not wish to continue on this case.

Sincerely,
Claire Toombs
Claire Toombs

Dear Claire
I regret the tone of your letter particularly in light of the actual facts; e.g. you promised help in

back with me when you were last
in New York, you did not, this
causes delay. The effort to get
medical and hospital reports
has been going on for months and &
I finally received a statement
from Dr Clyman the other day.
The hospital report I still do not have.
I have read & want a copy of the
report of your stay in the hospital.
I have read this to Miller, by
telephone. You are capricious and
choose. ~~I can~~ This is not a practical
or honest suggestion ~~in any event that~~
~~even if I could find other~~ ~~some~~
~~In all these reasons I have~~
Furthermore I have told you in the only
place ~~I can~~ a suit could be brought is
in Canada or here, the defendants are.
I have been trying to get you a settlement
without the necessity of suit.
Perhaps since we don't see eye to
eye, you had better obtain another attorney.
Yours

3/22 Phoned Stoderleader – We want to arrange for Claire to come to NY to be examined by his doctor – We have doctor's report + when we also have hospital report will send both to him.

He says: upon receipt of med. + hospital report will be in contact with CR. Can make suitable arrangements then.

March 22, 1965

Miss Claire Toombs
c/o Miss. Freedom Democratic Party
1353 U Street N.W.
Washington, D.C.

Dear Claire,

Enclosed is a copy of the report from Dr. Clyman.

Please let me know when you will be in New York so that we can arrange a medical exam with the insurance company.

Sincerely,

Carl Rachlin
General Counsel

Enc./

CR:hdl

THE FOLLOWING PAGE(S) ARE THE BEST COPY AVAILABLE.

March 23, 1965

Miss Claire Toombs
c/o Miss. Freedom Democratic Party
1353 U Street N.W.
Washington, D.C.

Dear Claire,

I regret the tone of your letter of March 20th, particularly in light of the actual facts; e.g. you promised to get in touch with me when you were last in New York. You did not. This causes delays.

The effort to get medical and hospital reports has been going on for months and I finally received a statement from Dr. Clyman the other day. The hospital report I still do not have. I have said I want a copy of the report of your stay in the hospital. I have said this by letter, by telephone. No one can pick and choose. This is not a practical or honest suggestion.

Furthermore, I have told you the only place a suit could be brought is in Nevada where the defendant is. I have been trying to get you a settlement without the necessity of suit.

Perhaps, since we do not see eye to eye, you had better obtain another attorney.

Very truly yours,

Carl Rachlin

CR:bdl

April 1, 1965

Miss Claire Toombs
c/o Miss. Freedom Democratic Party
1353 U Street, N.W.
Washington, D.C.

Dear Claire,

Jim has told me of the dreadful tragedy. What can I say? All of us at CORE feel with you and would hope to share in a very small way your sorrow.

It is sad to turn to business at this time, but we must. Please drop a letter to your hospital as follows: "Send my attorney, CARL RACHLIN, 165 West 46th St., New York, N.Y. a copy of my hospital record. Advise him what your charge for this is and you will be paid. This letter is your authority to give him my records."

Send me a copy of this and I will get in touch with them.

Take care of yourself. Perhaps I'll see you in Washington. On the voting rights bill I have been working closely with Bill Higgs and the MFDP group.

Sincerely,

Carl Rachlin

CR:hdl

MISSISSIPPI FREEDOM DEMOCRATIC PARTY

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WASHINGTON, D. C. - 20009
Telephone: (202) 332 - 7732

April 6, 1965

APR 7 REC'D

Carl Rachlin
165 West 46th St.
New York, N.Y.

Dear Mr. Rachlin:

Thank you very much for your letter of April 1st. Because of all that has happened, it is much relief to me that you will continue on the case for me. From the things you said in your March 23rd letter, I really have the feeling that maybe you haven't been receiving some of my letters, like in one I explained the reasons I didn't contact you when I was in N.Y. in Feb., and I also said that anytime you want to make an appointment for the examination in N.Y., go ahead, and just give me a few days notice, and unless there is something urgent on that day, I'll be there. I also asked if it were possible to do this through a doctor in Washington, I'm repeating this because there is a chance you didn't get my letter for any number of reasons.

I also recently found out that my mother had someone write you from N.Y., and I'm sorry if you have been bugged from every end, she hadn't told me of this.

I hope you will let everyone at CORE know how much I appreciate the knowledge that they are my friends, and I realize that many people there have suffered a loss in this too.

I have enclosed a copy of the letter to the hospital.

Sincerely,

Claire

Claire Toombs

P.S. When you get a statement from the hospital I would appreciate you letting me know exactly how much was paid to them, for my income tax purposes.

And also do you know if I can duduct it, I'm not sure if my mother did or not, and have no way of finding out now.

333 5th Street S.E.
Washington, D.C.
April 6, 1965

Halcyon Rest Hospital
754 Boston Post Road
Rye, New York

Dear Sir:

Please send my attorney, CARL RACHLIN, 165 West 46th Street, New York, N.Y. a copy of my hospital record. Advise him what your charge for this is and you will be paid. This letter is your authority to give him my records.

Yours Truly,

Claire Toombs

Claire Toombs

MAY 12 1965

333 5 St. S.E.
Washington, D.C.
May 10, 1965

Carl Rachlin
c/o CORE
38 Park Row
New York, N.Y.

Dear Mr. Rachlin:

In my last letter (about a month ago), I asked if you would make the doctor appointment at your convience, and let me know. I haven't heard from you and don't know what you plan now so I am going to try and get to N.Y. next Monday .

Whatever has to be done by me please try and arrange for that day, I'd also like to see you then if possible.

Please acknowledge this one way or another so we will not run into difficulities as we did last time I came up there.

Sincerely,

Claire

Claire Toombs

Phones

Home: 202 547-8618

Office: 202 546-4450

April 30, 1965

Ruth Jacobs, Esq.
1255 Post Street, Suite 700
San Francisco, California

Dear Ruth,

I enclose a Delinquincy Notice from the fair City of San Francisco concerning alleged Personal Property Tax. Are you in a position to enquire and find out whether we are supposed to pay such a tax, and on what?

Thanks.

Love and kisses,

Carl Rachlin
General Counsel

CR:JG

cc: Mr. Isaac Reynolds

enclosure

a national organization with affiliated local groups working

CONGRESS OF RACIAL EQUALITY

CORE

to abolish racial discrimination by direct, nonviolent methods

38 PARK ROW
NEW YORK 38, NEW YORK
COrtlandt 7-6270

James Farmer
national director

ADVISORY COMMITTEE
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assistant
Carl Rachlin, Esq.
general counsel
James McCain
director of organization
Marvin Rich
community relations director

May 18, 1965

Ruth Jacobs, Esq.
1255 Post Street
San Francisco, California

Dear Ruth:

Do you happen to know of a lawyer in Los Vegas who could take on an ordinary negligence case?

As I understand it, injuries were involved as a result of reckless driving of such a nature that two tires were caused to blow out.

The case is against a Los Vegas resident named Salsbery.

Let me know when you can.

Love and kisses,

Carl

Carl Rachlin
General Counsel

MAY 28 1965

CR:JG

5/26/65

Dear Carl:

Charles ~~Katz~~ E. Catt (CATT)
309 South Third St
Las Vegas

~~[illegible]~~ (over)

Forgive the informality —
My secretary just darted out
& I darted in — We just moved
from Valley Pr to 2500 Filbert, SF

My associate Leo Fried
says Catt is very good —

Best to you, too

Russ.

June 15, 1965

Charles E. Catt, Esq.
309 South 3rd Street
Las Vegas, Nevada

Dear Mr. Catt:

I write to you on behalf of a young woman named Claire Toombs.

On July 12, 1964 Miss Toombs was a passenger in a car owned by Don G. Salsbery of Las Vegas. At that time Mr. Salsbery worked for IBM. Mr. Salsbery drove his car in an extremely reckless and careless manner far beyond ordinary negligence, and went around a curve so fast that the car went off the road and Miss Claire Toombs was knocked unconscious. When she came to she had bad headaches and a severe pain in her head and numerous bruises and contusions on her arms and body. I believe the next day she was taken to see a Las Vegas doctor. She was still in bad condition at that time. He treated her arms but neglected to treat her head. She thinks his name is something like Bower. She had told the doctor that she was unconscious but he never checked for concussion or related injuries.

After this visit to the doctor she was still feeling very bad and talked to a representative from the insurance company. The insurance broker apparently was a Thomas M.Grimes of L. R. Gresham & Company, of 312 Las Vegas Blvd., North. The company had agreed to pay her medical bills but has never offered her anything for the injuries themselves.

When she got back to New York, a day or two thereafter, she was so sick that she was taken to a rest home and had a nervous breakdown.

Cont'd.....

You have been recommended to me by an old and dear friend, an attorney in San Francisco, Ruth Jacobs, who is an office associate of Leo Fried. I would hope that you, or someone you suggest if you are not available, will undertake to protect Miss Toombs rights. I have no interest in the case, except that I want to help Miss Toombs. I have conducted some negotiations with the insurance company in New York but without a law suit pending in Nevada the negotiations are meaningless. As I said they have offered to pay her bills but have refused to pay anything for pain and suffering. They claim the Nevada "guest" statute precludes recovery but from her testimony and from what happened it would appear that far more than ordinary negligence is involved on the part of Mr. Salsbery.

I hope that you can undertake this obviously any fee arrangements that you would have would not involve me in any way at all. If you can undertake this, or can have someone else undertake this if you are not available, I will send you all the papers that I have.

Thank you for your courtesy.

Sincerely,

CR/cs

CARL RACHLIN

June 28, 1965

Miss Claire Toombs'
c/o Mississippi Freedom
Democratic Party
Washington, D. C.

Dear Claire:

Enclosed is a copy of a letter from Mr. Charles E. Catt a lawyer from Las Vegas. Please express your comments on the facts. Let me hear from you shortly.

With best regards,

Sincerely,

CARL RACHLIN

CR/cs
Enc. 1

Charles E. Catt

Attorney at Law

120 SOUTH THIRD STREET-SUITE 6
POST OFFICE BOX 757
LAS VEGAS, NEVADA
382-1128 AREA CODE 702

from Salsbery

June 22, 1965

RECEIVED
JUN 24
VLEDICK, ALLEN, FRANKEL & TLADOCK

Carl Rachlin, Esq.
165 West 46th Street
New York, N. Y. 10036

Dear Mr. Rachlin:

I have made an investigation in reference to your letter of June 15th concerning Claire Toombs.

Mr. Salsbery says a tire blew out; that he was not driving at an excessive speed at the time and that Miss Toombs was not knocked unconscious. He states that her only complaint at the time was a bruised elbow; that he was taking her for a ride at the time because she had threatened suicide if a friend of his didn't come to see her and he was driving her around because he couldn't find the friend. Mr. Salsbery says there is ample evidence that Miss Toombs was neurotic at the time and that her physical injuries were by no means the cause of her nervous breakdown.

Our Guest Statute does require proof of gross negligence as a basis for any claim. Considering there are no witnesses in this jurisdiction, I don't believe it would be worthwhile to file an action here.

I hope that I have been of some help and I regret that the picture is not brighter.

Yours very truly,

Charles Catt

CHARLES E. CATT

CEC:vc

Via Air Mail

Joanne v Salsberg

JUL 2 1965

333 5th St. S.E.
Washington, D.C.
June 30, 1965

Mr. Carl Rachlin
c/o CORE
38 Park Row
New York, N.Y.

Dear Mr. Rachlin:

I've begun to feel some concern about the time shortage we have to file suit, if this is to be done, as we agreed last time we spoke.

The suit would have to be filed by the beginning of August, in order to stay within the limit of a year.

I would appreciate it if you would let me know who you contacted in Navada to handle this, and what if anything I should do now.

Best wishes.....

Sincerely,

Claire

Claire Toombs

letter passed on to Neal with mini outline up to now

JUL 6 REC'D

333 5th St. S..E.
Washington, D.C.
July 2, 1965

Mr. Carl Rachlin
165 West 46th St.
New York, N.Y. 10036

Dear Mr. Rachlin:

I guess our letters crossed, so please disregard the last.

Of course, what Mr. Salsbery says is completely untrue, and I expected him not to tell the truth, since it is so serious. It is possible the tire did blow out, that I don't know, but he was going extremely fast, I was knocked out (which was told to the doctor I saw in Nevada, although I'm not sure if he would admit to it since apparently he is a friend of Salsbery's.) My complaint of injury at the time was not just of a bruised elbow, as a matter of fact my neck and head were x-rayed in Nevada because of my complaints, and of course, it is on record by the doctor in New York that I did have a concussion among other things, and it was negligence on the part of the doctor in Nevada that I was not advised of this and should have been in bed for at least a week, after it happened and not trying to assume a normal living schedule. True I was neurotic, still am and probably always will be, but I was not threatening suicide, Salsbery was not driving around looking for his friend, (he was taking me to a place he said we could go swimming. Does a person who is about to kill himself go swimming? If he were going to kill himself he would certainly go alone if that is the way he chose.) I'm sure that Salsbery does have plenty of people at the hotel etc., that would testify in his favor since he has (apparently, such as the doctor) influence in Las Vegas, and also money which if waved a little has a lot of influence. He is just the type who would do just that too. As I told you he was seperated from his wife and because of the community property laws was very afraid of it even being found out that he was with me that night, for the reasons that he was. I also told you what happened at the motel after the accident, and to keep this from ever being said, even though I can't prove it, he would pay off a lot of people I'm sure.

I don't know if legally this has any merit, but I'm inclined to think that since we obviously can't prove negligence in terms of his driving, we certainly can as far as my medical care was concerned, the fact that I was acting in a "neurotic" manner, does not necessarily mean I would have cracked up anyway. But I think that most any person who lives on a active schedule for a week with a concussion, sprained neck etc., would be very strained emotionally as well as physically. If I had been hospitalized as I should have been, the extra emotional strain would not have been applied, and I therefore do not think I would have cracked up.

Actually, if both of you think its useless, the truth may as well not be pursued, because of the expense, and I'm tired, involved in considering taking action in my sisters death, the endless papers, forms, questions etc., involved in both deaths. It seems endless and money has never been very important to me. The primary reason for my wanting to pursue this was because I have been wronged so severly in this case, that it is the principle of the mess that is important. Of couse I would want the doctor, hospital etc. expenses paid, but if this can't be, I do have plenty of time to pay

back the people who helped me out financially.

So I guess all I can do now is ask your advise, and rely on it, regardless of what that advise is, I do want you to know that I sincerely appreciate all the time and energy you've put into this.

Sincerely,

Claire

Claire Toombs

PROGRESS NOTES

Patient TORRES, Claire Identification No.

ADMISSION NOTE 8/23/64:
This 21 year old white female patient was admitted to Halcyon Rest Hospital today on a Voluntary Application. She came by private car, accompanied by her mother. During the interview she was agitated and depressed, and spoke angrily. She spoke of not liking America. She was fighting for a cause but did not like being in prison for 1 month in the South. She said that she had no suicidal ideas but that she would like to die.

H. Thomas, M.D.

8/29/64 C.C. NOTE
This patient left the hospital today to return to her mother's home for a matter of a few days, after which it was her intention to go to Philadelphia. There she was planning to seek new employment in a different environment, an effort to stabilize herself. Although she was quite angry for the first couple of day and felt that she had made a mistake in signing herself into the hospital, she overcame this feeling and became quite amenable and friendly. She could not account for the period of the week prior to her admission to Halcyon Rest Hospital, when she gave up entirely and felt so immobilized. She was apparently shaken by her experience in Las Vegas, and frightened by it.

This patient has some potential for recovery but it would appear that she would have to be under considerable care and guidance to help her achieve such an end. She is too volatile, impulsive and insecure on her own. If she is left to her own resources, the chances are that she will enter into more and more situations which will eventually be her ruination. Unfortunately there is nobody who can be a solid mentor and adviser, since she is very much on her own.

CONDITION: Improved.
DIAGNOSIS: 21. PSYCHONEUROSES. 165. REACTIVE DEPRESSION. Alexander Cou

To: CARL RACHLIN, Attorney. Date: 4/14/65

Re: TOOMBS, Claire. Born 3/28/43
333 5th St., Washington D.C.

At your request, we enclose records on the above named patient.

We would appreciate the return of this data when it has served your purpose. Thank you.

Alexander Carlen, M.D., Director,
HALCYON REST HOSPITAL,
734 BOSTON POST ROAD,
RYE, NEW YORK.

Form 124-Med. (Rev. Sept. 1958)

HALCYON REST HOSPITAL—CLINICAL SUMMARY

Name [redacted], Claire

Sex F Age on admission 21 Iden. No. ..... Hosp. No. [redacted]

married, widowed, divorced, separated. Citizen, alien, non-resident, single.

Date of admission 8/23/64 Date of summary .....

Name and address of nearest relative Mother: Constance [redacted], 248 [redacted] Ave., Westhaven, N.Y.

Diagnosis 21. PSYCHONEUROSES ..... 165. REACTIVE DEPRESSION

ANAMNESIS:

Informants: Patient and her mother. The mother has been a patient herself at Halcyon Rest Hospital in 1963 for about 5 days because of drinking. She has been married and divorced twice. Her information is considered to be fairly reliable.

CHIEF COMPLAINT:

The patient has been under psychiatric care for the past two or three years. She had a car accident and broke up with a boy friend when they were supposed to be getting married in Las Vegas. She lost consciousness and suffered dizziness and headaches after the accident and was depressed and irritated when she returned to New York. For three days prior to admission to Halcyon Rest Hospital she has been lying in bed, crying hysterically and not wanting to do anything, even comb her hair.

FAMILY HISTORY:

Father: He separated from the mother when the patient was 2 years old. He died when the patient was 15, from a heart attack. He was described by the informants as having been a heavy drinker who did not care for children, even his own family. He lived with his wife for 9 years before they separated.

Mother: Living and well. She has been a patient herself at Halcyon Rest Hospital because of drinking. She remarried 1 year after separating from the patient's father and lived with her second husband for 9 years. The stepfather was said to have been very mean to the patient and they often argued and fought.

Siblings: Sister, who has been receiving psychiatric treatment for the past several years. She is now engaged and about to be married. The remainder of the family history is negative for mental disorders.

PERSONAL HISTORY:

The patient is the youngest of two siblings. Birth and early development were said to have been normal. She was born in New York City on 3/26/43. When she was 2 years old her parents separated and a year later the mother remarried. The stepfather is described as having been mean and unpleasant to the patient. She had the usual childhood diseases without complications. She started school at the usual age and was said to have been an average student. She stated, "I could have been better, but nobody told me." When asked how she

Form 124-Med. (Rev. Sept. 1958)

HALCYON REST HOSPITAL—CLINICAL SUMMARY

Name TOMMS, Claire Iden. No. ..... Hosp. No. [redacted]

Sex F Age on admission 21 Citizen, alien, non-resident, single, married, widowed, divorced, separated.

Date of admission 8/23/64 Date of summary .....

Name and address of nearest relative .....

Diagnosis .....

PERSONAL HISTORY (Continued)

got along with her teachers, she said, "I did not get along with my teachers. They are very stupid. I could be an average student by doing nothing in school."

During her last year as a senior in high school the patient married a man whom she had known for only 3 months. After living with him for 3 months she found that she did not care for him. She left him and went South with a group of Freedom Riders, and was in prison for 1 month in the South.

ONSET OF PSYCHOSIS:

The patient feels that her problems started when she was a senior in high school, when she became pregnant from a man she loved, but he had walked out on her. She became depressed and withdrawn and went to a private psychiatrist. With regard to her present attack, she stated, "I met a man and thought I loved him. We went to Las Vegas for a vacation." Whilst there, the patient discovered that the man was married and had children and merely wanted to have a good time with her. She became angry and they had a car accident. She fainted and had a pain in her right shoulder and arm. She was seen by an orthopedist who took x-rays, these being found negative for fractures. Her headaches and dizziness continued and she became more depressed and irritated, being unable to continue working. In the past 3 days she has remained in bed in her mother's house, crying hysterically, and would not even comb her hair. Her mother called her private psychiatrist, who advised hospitalization.

H. [redacted], M.D.

Halcyon Rest

PROGRESS NOTES

Patient YOUNG, Claire Identification No.

MENTAL STATUS

ATTITUDE & GENERAL BEHAVIOUR:

This 21 year old white female patient was only partially co-operative and looked angry. She answered questions angrily and at times raised her voice.

STREAM OF MENTAL ACTIVITY:

The patient was overproductive, evasive, but coherent and relevant, although most of the time she was illogical and irrelevant. Blocking of ideas, language deviation or neologism were not elicited.

EMOTIONAL REACTION:

Inappropriate. She appeared agitated and depressed. She had a history of crying spells and becoming hysterical.

MENTAL TREND - CONTENT OF THOUGHT:

The patient comes from parents who separated when she was 2 years old, because the father drank heavily and did not care for children. The mother remarried a year later to a man who was mean to the patient. The patient has apparently been an 'angry young woman' all her life. She has been involved sexually with men since the age of 15 and in the last year of high school she became pregnant by a man who walked out on her. After highschool she worked as a secretary and became involved with another man. When she went to Las Vegas with him, apparently to get married, she discovered that he already was married and had a family, and had no intention of marrying her - according to the patient, he just wanted to have a good time with her. They were involved in a car accident where the patient received injuries to her head and right side. She became more depressed and continued to have headaches and dizziness after the injuries. She has been under the care of a psychiatrist and he advised hospitalization. Hallucinations were not elicited.

SENSORIUM, MENTAL GRASP AND CAPACITY:

(a) Sensorium: Clear.

(b) Orientation: Well oriented in all 3 spheres.

(c) Memory: I. Remote: Fair
II. Recent past Fair

(d) Retention and immediate recall: Fairly well performed.

(e) Counting & calculation: Fair.

(f) School and general knowledge: Apparently above average.
(g) Intelligence rating: Apparently above average.
(h) Insight & judgment: Impaired.

R. Zahn, M.D.

SOFRE

TRACY, GENEVA, et. al. vs. ROBBINS, JACK W., et. al., 1965-1966
(DORCHESTER CO., S.C. SCHOOL DESEGREGATION)

Box 42
Folder 25

...ity of Wisconsin

Please Retain Original Order

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

GENEVA TRACY, VICTORIA DE LEE, ANNA WILLIAM, OLLIE MAE UTSEY, DIANNE GRANT by her mother and next friend, LAUREEN GRANT, EDNA DE LEE by her mother and next friend, CORA LEE DE LEE, JAMES LEMON, by his mother and next friend, BEATRICE LEMON; on their own behalf and on behalf of all others similarly situated,

PLAINTIFFS,

vs.

JACK W. ROBBINS, individually and as Chief of Police of the Town of St.George; W. DUNCAN HORNE, individually and as Mayor of the Town of St. George; J.WILSON PATRICK, individually and as Town Attorney for the Town of St. George; and their agents, successors, employees, subordinates and attorneys,

DEFENDANTS

FILED
SEP 27 1965
HELEN BREELAND
C.D. U.S.,E.D.S.C.

CIVIL ACTION
NO. 8781/65

MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

Plaintiffs, by their verified complaint, move this court for a temporary restraining order and preliminary injunction restraining and enjoining defendants, their officers, agents, servants, employees, attorneys, successors and all those acting in concert or participation with them, from:

1. Enforcing and effectuating the picketing ordinance (Exhibit A) and from making arrests or incarcerating persons or taking any other action pursuant to said ordinance;

2. Arresting and incarcerating plaintiffs and members of the class which they represent, and from taking any other action pursuant to the above -mentioned picketing ordinance until the termination of this litigation;

3. Enacting any amended or substitute ordinance imposing subsequent punishment on the constitutionally protected activity of peacefully assembling, picketing and demonstrating for the communication of political expression or belief.

4. That the defendants be ordered to provide plaintiffs and the class which they represent with adequate police protection from violence, intimidation and harassment while peacefully assembling, picketing or demonstrating on the public streets and sidewalks of St.George so that they can exercise their constitutional rights to free speech, and assembly and to petition for the redress of grievances as guaranteed by the First and Fourteenth Amendments to the United States Constitution

5. That the defendants be ordered to distribute copies of said temporary restraining order to all of their subordinates (including deputies, police officers, investigators and other law enforcement personnel) together with a directive ordering compliance, and ordering that they on their own initiative take prompt steps to discipline any subordinate whom they may find to have violated the terms of the Court order.

6. That the defendants be restrained from committing any act of violence or threatened violence against plaintiffs or any person for the purpose of preventing or discouraging such person or any other person from picketing, assembling or demonstrating or exercising other fundamental personal rights, or advocating equal rights for Negroes, or assisting or encouraging others to do the same.

7. That the Court grant such other and further relief as may be just and proper.

Respectfully submitted,

Henry M. di Suvero
c/o Mr. Willie C. Tracy
107 Franklin Ave.
St. George, SC

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

GENEVA TRACY, VICTORIA DE LEE, ANNA WILLIAM, OLLIE MAE UTSEY, DIANNE GRANT by her mother and next friend, LAUREEN GRANT, EDNA DE LEE by her mother and next friend, CORA LEE DE LEE, JAMES LEMON BY his mother and next friend, BEATRICE LEMON; on their own behalf and on behalf of all others similarly situated,

PLAINTIFFS,

vs.

CIVIL ACTION

NO.

JACK W. ROBBINS, individually and as Chief of Police of the Town of St. George; W. DUNCAN HORNE, individually and as Mayor of the Town of St. George; J. WILSON PATRICK, individually and as Town Attorney for the Town of St.George; and their agents, successors, employees, subordinates and attorneys,

DEFENDANTS

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA:

COMPLAINT

STATEMENT AS TO JURISDICTION

1. This is a civil action brought by the plaintiffs individually and on behalf of all those similarly situated for a temporary restraining order, a preliminary injunction, a permanent injunction and other equitable relief, to enjoin the deprivation under color of law of plaintiffs' rights, privileges and immunities secured to the plaintiffs by the Constitution of the United States as hereinafter more fully set forth. The suit also seeks a judgement declaring void and unconstitutional an ordinance of the Town of St. George, South Carolina (" St. George "), which deprives the plaintiffs of their constitutional rights.

2. Jurisdiction is conferred on this Court pursuant

to Title 42 U.S.C. Secs. 1981, 1983, 1985, 1988 and Title 28 U.S.C. Secs. 1343, 2201 and 2202.

3. Plaintiffs Geneva Tracy, Victoria De Lee, Anna William, Ollie Mae Utsey, Dianne Grant, Edna De Lee and James Lemon are Negro citizens of the United States and of the County of Dorchester, State of South Carolina. Plaintiffs Tracy and Utsey are residents of St. George. All plaintiffs are actively engaged in lawful and peaceful activities aimed at securing to members of the Negro race who are residents of the State of South Carolina, of the County of Dorchester and of St. George, the full enjoyment of rights granted by the Constitution and laws of the United States. They sue individually and on behalf of all other residents of St. George who have been similarly engaged in civil rights activities, which class is too numerous to bring before the court. Plaintiffs bring this action pursuant to Rule 23 (a)(3) because there are common questions of law and fact affecting all members of the class , and because common relief is sought. The interest of said class is adequately represented by plaintiffs.

4. Defendant Jack. W. Robbins is the Chief of Police of St. George, and as such is the chief public official of the municipality responsible for the preservation of the peace and public safety of St. George and the enforcement of the ordinances of St.George and the statutes of the State of South Carolina. He is sued herein individually and in his official capacity as Chief of Police. Defendant W. Duncan Horne is the Mayor of St.George and is authorized, empowered and directed by and under the statutes of the State of South Carolina to have superintending control of all the officers and affairs of the municipality and to take care that the laws and ordinances thereof are executed. He is sued individually and in his official capacity as Mayor. Defendant J. Wilson Patrick is the Town Attorney of St. George, and as such is the chief public official of the municipality responsible for the prosecution of alleged violations of the ordinances thereof and for the prosecution of alleged violations of statutes of the State of South Carolina. He is sued herein individually

and in his official capacity as Town Attorney.

CLAIM FOR RELIEF

5. Plaintiffs and the members of the class which they represent have been and are engaged in activities in the State of South Carolina and in St. George which seek to obtain equal employment opportunities for Negroes, to assure to Negroes the right to avail themselves of public facilities and accommodations subject to the Civil Rights Act of 1964, to obtain equal voting rights for Negro citizens and generally to secure due process of law and equal protection of the laws to Negroes who are and have been deprived of these rights. In protest of the existence of discrimination, segregation and the denial of constitutional rights to the Negro citizens of St.George, plaintiffs have engaged or assisted in peaceful demonstrations, have distributed leaflets publicizing protests and boycotts, held meetings for the expression of such protests, and have peacefully picketed in an orderly fashion on the several sidewalks of St. George, all in the exercise of their rights of free speech, petition and assembly secured by Amendments I and XIV of the United States Constitution.

6. An ordinance of St. George (the "picketing ordinance") prohibits demonstrations and picketing "in any manner" which interferes with pedestrians or which blocks or interferes "in any manner" with the entrances or exits of stores or businesses; it further provides that any person "incharge" of picketing or demonstrations or who may be "engaged in placing, managing or in anywise controlling" picketing or demonstrations must be more than three hundred feet from the pickets or demonstration. The picketing ordinance is entitled:

> AN ORDINANCE TO PREVENT UNLAWFUL PICKETING OR DEMONSTRATIONS IN THE TOWN OF ST.GEORGE, S.C.; AND THE DIRECTION, MANAGEMENT OR CONTROL OF PICKETS OR DEMONSTRATIONS IN SAID TOWN; AND TO PROVIDE PENALTIES FOR VIOLATION.

A copy of said ordinance is attached as Exhibit A.

7. Said picketing ordinance is void and unconstitutional on its face in that it is excessively vague and uncertain and

in that it is overbroad, sweeping within its ambit constitutionally protected rights of free speech and liberty of movement, all of which denies to plaintiffs the freedom of speech and assembly and due process of law to which they are entitled under the First and Fourteenth Amendments of the United States Constitution. The ordinance emasculates the preferred position enjoyed by First Amendment rights by making <u>any</u> interference with pedestrians unlawful and also making <u>any</u> interference with traffic to entrances of businesses unlawful. The "300 feet" provision has no legitimate police purpose, violates the right of leaders to associate with, or assemble with their followers and curtails their liberty of movement. Said provision makes criminal activity which is connected to admittedly lawful picketing under the ordinance itself. The terms "demonstrate", "interferes with", "block", "in charge of", "engaged in directing, placing, managing or in anywise controlling" are all vague and indefinite. In the area of First Amendment freedoms any restrictions upon such rights, if they are to be upheld at all, must be narrowly and specifically drawn. The wide and vague sweep of the picketing ordinance is exactly what the Constitutional guarantees condemn.

8. Commencing on or about Aug.1,1965 and on various days thereafter, plaintiffs or those associated with them have peacefully picketed in small single line formations and in a silent fashion in front of several stores in St. George.

9. On Aug. 20,1965 Evonne Williams, a seventeen year old Negro, while picketing in front of the Piggily Wiggily store, was charged with violating the predecessor picketing ordinance. A copy of said ordinance is attached hereto as Exhibit B. Defendant Williams was charged with blocking and interfering with traffic at the entrance of said store. She appeared in Municipal Court on Aug.30,1965 and although she is indigent, no examination was made of her means, and no offer to appoint counsel was made by the presiding officer, the defendant W. Duncan Horner herein. The City's case showed the defendant did not move quickly enough out of the way of a truck which eventually parked perpendicula across the side-

walk of Gavin St., in front of the aforesaid store in front of which the picket line was being conducted. Appearing pro se the defendant was found guilty and fined $25. The Town of St. George was represented by a prosecuting attorney. Subsequently the School Board of Dorchester County refused to transfer the defendant from an all Negro school to an all white school on account of her conviction.

10. On Sept. 18,1965 Van H. De Lee, while marching on the picket line was arrested for simple assault and battery. The case was removed from the Magistrate's Court of Dorchester County to this Court on Sept. 24,1965. (U.S.D.C.E.D.So.C. Criminal Action No. 24,427). The Petition therein fully develops the extent to which the petitioner's First and Fourteenth Amendment rights were violated.

11. On Sept. 25,1965 at about 9:40 a.m. plaintiffs Victoria De Lee, Anna William, Dianne Grant, and Edna De Lee, while seated in a car owned by the Congress of Racial Equality ("CORE"), an organization dedicated to the advancement of equal rights for all races, were arrested by defendant Jack H. Robbins. The car was lawfully parked in a parking meter zone. The arrest warrant charges the defendants with violation of the picketing ordinance in that they are said to have been engaged in supervising the activity of the picket line which was less than 300 feet away. The defendants Victoria De Lee and Anna William had not conversed with any of the four picketeers from the inception of the picketing that morning. The defendants Dianne Grant, age 15 and Edna De Lee, age 14 have never acted in a supervisory capacity in connection with any picketing activity; indeed they have never been on the picket line.

12. Plaintiffs and others of the class they represent desire to engage in further picketing and demonstrations in Saint George to protest the failure of the city officials of St. George to respond in any way to their legitimate demands or to insure their enjoyment of all the privileges and rights of citizens of the United States and of the State of South Carolina without discrimination on the ground of race or color.

13. Plaintiffs are prevented from engaging in picketing or demonstrating by the risk of further arrests, prosecution and incarceration under the picketing ordinance. (Exhibit A). The practice of the police of St.George of arresting and incarcerating violators of said unconstitutional ordinance deters plaintiffs from picketing and demonstrating and therefore, effectively denies to them the exercise of their constitutional rights as protected by the First and Fourteenth Amendments to the United States Constitution.

14. Unless the picketing ordinance is declared unconstitutional by this Court and the defendants enjoined from enforcing it, plaintiffs will continue to be denied said constitutional rights and plaintiffs will be unable to vindicate said rights without subjecting themselves to arrest, prosecution and incarceration.

15. This suit involves a genuine case or controversy because the picketingordinance deters the lawful and peaceful activities that the plaintiffs and the class which they representhave already undertaken and desire to undertake as hereinabove set forth.

16. Plaintiffs have no adequate remedy at law and will suffer irreparable injury unless a temporary restraining order, a preliminary injunction and a permanent injunction are granted.

PRAYER FOR RELIEF

17. WHEREFORE, plaintiffs respectfully pray:

(a) That defendants be permanently enjoined from enforcing and effectuating the picketing ordinance (Exhibit A) and from making arrests, prosecuting or incarcerating persons or taking any other action pursuant to said ordinance.

(b) That a temporary restraining order and a preliminary injunction be granted to plaintiffs enjoining defendants, and each of them, and those acting in concert or pursuant to their orders, from arresting, prosecuting, or incarcerating plaintiffs and members of the class which they represent, and from taking any other action pursuant to the above-mentioned

picketing ordinance until the termination of this litigation.

(c) That said relief extend to any amended or substitute ordinance imposing a subsequent punishment on the constitutionally protected activity of peacefully assembling, picketing and demonstrating for the communication of political expression or belief.

(d) That the defendants be ordered to provide plaintiffs and the class which they represent with adequate police protection from violence, intimidation and harassment while peacefully assembling, picketing or demonstrating on the public streets and sidewalks of St. George so that they can exeercise their constitutional rights to free speech, and assembly and to petition for the redress of grievances as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

(e) That the defendants be served with a copy of this Court's judgement and that they be ordered to distribute copies of any temporary restraining or preliminary injunction or permanent injunction order granted herein to all of their subordinates (including deputies, police officers, investigators and other law enforcement personnel) together with a directive ordering compliance, and ordering that they on their own initiative take prompt steps to discipline any subordinate whom they may find to have violated the terms of the Court order.

(f) That this Court retain jurisdiction of this case for the purpose of enforcing any temporary restraining or injunctive order issued herein and for such other orders and proceedings as may become necessary in connection herewith.

(g) That any restraining or injunctive order issued by this Court be binding on the defendants and their agents, servants, employees, attorneys, successors in office, and all persons in active concert and participation with them who receive notice of the order.

(h) That the defendants be restrained from committing any act of violence or threatened violence against plaintiffs or any person for the purpose of preventing or discouraging such person or any other person from picketing

assembling or demonstrating or exercising other fundamental personal rights, or advocating equal civil rights for Negroes, or assisting or encouraging others to do the same

(i) That judgement be entered against the defendants individually and in their official capacities for damages inflicted upon plaintiffs as a result of defendants' unlawful acts in the following amounts:

1. Jack W. Robbins - $50,000.
2. W. Duncan Horne - $50,000.

(j) Plaintiffs further pray that they be accorded their costs, including reasonable attorneys' fees, as well as such other and further relief as may appear to the Court to be equitable and just.

Respectfully submitted,

Henry M. di Suvero
c/o Mr. Willie C. Tracy
107 Franklin Ave.
St. George, S.C.

OF COUNSEL
Russell Brown
39 SPRING ST
CHARLESTON, S.C.
723-4573

VERIFICATION

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) SS.:

I, HENRY M. DI SUVERO, of lawful age, first being duly sworn upon oath, depose and say:

That I am a member of the bar of the State of New York and of the State of California, and of the Southern District and of the Eastern District of the United States District Court of New York, and ~~that~~ of the United States District Court for the Eastern District of South Carolina

That I am the duly authorized attorney for plaintiffs herein authorized to prepare and verify the annexed complaint;

That I have read the annexed complaint and know the contents thereof;

That I know of my personal knowledge that all the facts stated therein are true or supported by signed statements or are stated on information and belief;

That as to subject matter I believe the complaint to be true and:

That I sign the verification on behalf of the plaintiffs, because the annexed complaint deals chiefly with matters of law and legal inference to be drawn from facts alleged and/or of which I as an attorney have more knowledge than the plaintiffs

Henry M. di Suvero

Subscribed and sworn to before me
this ~~6th~~ day of September, 1965

Russell Brown

Notary Public

Notary public for such county
My commission expires at
the pleasure of the sovereign

EXHIBIT A

AN ORDINANCE TO PREVENT UNLAWFUL PICKETING OR DEMONSTRATIONS IN THE TOWN OF ST. GEORGE, SOUTH CAROLINA: AND THE DIRECTION, MANAGEMENT OR CONTROL OF PICKETS OR DEMONSTRATORS IN SAID TOWN; AND TO PROVIDE PENALTIES FOR VIOLATION

Be it ordained by the Town Council of the Town of St. George, South Carolina:

Section 1. It shall be unlawful for any person or persons to picket or demonstrate in any manner which interferes with the lawful rights of pedestrians or persons lawfully upon or using the sidewalks and/or streets of the Town of St. George, S.C.; or to block, or interfere in any manner with, the entrances to or exits from stores, or other places of business or any property of any person or persons; or to fail or refuse to obey the lawful order or command of any policeman or law enforcement officer.

Section 2. It shall be unlawful for any person or persons in charge of picketing or demonstrations, or any person or persons who may be engaged in directing, placing, managing, or in anywise controlling pickets or demonstrators, picketing or demonstrations, in the Town of St. George, S.C., to be stationed within the same block where such demonstrations may be taking place or carried on; and in no event shall such person or persons be stationed or located nearer than a distance of three hundred (300) feet from the store, business or building where such pickets or demonstrators may be stationed.

Section 3. Any person violating any of the provisions of this Ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than ($10.00) ten dollars, nor more than one hundred ($100.00) dollars or imprisonment for not less than ten (10) days, nor more than thirty (30) days.

Section 4. All Ordinances or parts of Ordinances inconsistent herewith are hereby repealed.

Passed in Council this thirteenth day of September, A.D. 1965

EXHIBIT B

AN ORDINANCE TO PREVENT UNLAWFUL PICKETING IN THE TOWN OF ST. GEORGE, S.C.; AND TO PROVIDE PENALTIES FOR VIOLATIONS.

BE IT ORDAINED by the Town Council of the Town of St. George, South Carolina:

1. It shall be unlawful for any person or persons to picket or to demonstrate in any manner which interferes with the lawful rights of pedestrians or persons lawfully upon or using the sidewalks and/or streets of the Town of St. George, S.C.; or to block, or interfere in any manner with, the entrances to or exits from stores, or other places of business, or any property of any person or persons; or to fail or refuse to obey the lawful order or command of any policeman or law enforcement officer.

2. Any person violating any of the provisions of this Ordinance shall be deemed guilty of a Misdemeanor and upon conviction thereof shall be subject to a fine of not less than ten ($10.00) dollars, nor more than one hundred ($100.00) dollars, or imprisonment for not less than ten (10) days, nor more than thirty (30) days.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

GENEVA TRACY, VICTORIA DE LEE, ANNA WILLIAM, OLLIE MAE UTSEY, DIANNE GRANT, by her mother and next friend, LAUREEN GRANT, EDNA DE LEE, by her mother and next friend, CORA LEE DE LEE, JAMES LEMON, by his mother and next friend, BEATRICE LEMON; on their own behalf and on behalf of all other similarly situated, Plaintiffs, -versus- JACK W. ROBBINS, individually and as Chief of Police of the Town of St. George; W. DUNCAN HORNE, individually and as Mayor of the Town of St. George; J. WILSON PATRICK, individually and as Town Attorney for the Town of St. George; and their agents, successors, employees, subordinates and attorneys, Defendants.	CIVIL ACTION NO. 8781 FILED OCT 22 1965 HELEN BREELAND C.D.C.U.S.,E.D.S.C. NOTICE

TO: MESSRS. RUSSELL BROWN, ATTORNEY AT LAW, 39 SPRING STREET, CHARLESTON, SOUTH CAROLINA, AND HENRY M. di SUVERO, C/O MR. WILLIE C. TRACY, 107 FRANKLIN AVENUE, ST. GEORGE, SOUTH CAROLINA, ATTORNEYS FOR THE PLAINTIFFS:

PLEASE TAKE NOTICE that the undersigned attorneys for the Defendants will bring the annexed Motions on for a hearing before the United States District Judge, Eastern District of South Carolina, Charleston Division, at a time and date to be fixed by the said Court.

WALKER, WALKER & JENKINS

By S/ Sidney B. Jones, Jr.
Sidney B. Jones, Jr.
Guerin Building
Summerville, South Carolina

BARNWELL, WHALEY, STEVENSON & PATTERSON

By S/ Ben Scott Whaley
Ben Scott Whaley
5 Exchange Street
Charleston, South Carolina
Attorneys for Defendants

A TRUE COPY. ATTEST.
Helen Breeland
CLERK OF U.S. DISTRICT COURT
EASTERN DIST. SO. CAROLINA

October 22nd, 1965

ELL, WHALEY,
N & PATTERSON
ANGE STREET
ESTON, S. C.

I, Ben Scott Whaley, of counsel for the Defendants above named, do hereby certify that I have this day mailed a copy of the annexed Motions and Notice to each of the counsel for the Plaintiffs above named at the addresses above set forth.

S/ Ben Scott Whaley
Ben Scott Whaley
Of Counsel for the Defendants

October 22nd, 1965.

BARNWELL, WHALEY,
STEVENSON & PATTERSON
5 EXCHANGE STREET
CHARLESTON, S. C.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

GENEVA TRACY, VICTORIA DE LEE, ANNA WILLIAM, OLLIE MAE UTSEY, DIANNE GRANT, by her mother and next friend, LAUREEN GRANT, EDNA DE LEE, by her mother and next friend, CORA LEE DE LEE, JAMES LEMON, by his mother and next friend, BEATRICE LEMON: on their own behalf and on behalf of all other similarly situated, Plaintiffs, -versus- JACK W. ROBBINS, individually and as Chief of Police of the Town of St. George; W. DUNCAN HORNE, individually and as Mayor of the Town of St. George; J. WILSON PATRICK, individually and as Town Attorney for the Town of St. George; and their agents, successors, employees, subordinates and attorneys, Defendants.	CIVIL ACTION NO. 8781 MOTION TO DISMISS, MOTION TO STRIKE, AND MOTION FOR A MORE DEFINITE STATEMENT

FILED
OCT 22 1965
HELEN BREELAND
C.D. U.S.E.D.S.C.

A. MOTION TO DISMISS

The Defendants in the above entitled Civil Action move the Court to dismiss the Complaint and Claim For Relief on the grounds that the Complaint and Claim For Relief fail to state sufficient grounds upon which relief can be granted; and the further ground that the verification attached to the said Complaint states that the Complaint deals chiefly with (argument) matters of law and legal inference and is signed by an attorney rather than one of the Plaintiffs; and further the Complaint does not comply with the Federal Rules of Civil Procedure in that it does not separately state the cause or causes of action and does not contain a clear and concise statement as required by said Rules.

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CHARLESTON, S. C.

B. MOTION TO STRIKE

The Defendants in the above entitled Civil Action move that the following portions of the Complaint and Claim For Relief be stricken on the grounds hereinafter listed:

1. So much of Paragraph 3 thereof commencing with the word "all" on the fifth line of said paragraph through the remainder of said paragraph, which reads as follows:

Rule 23 (a)(3)

Define nature of class.

"All plaintiffs are actively engaged in lawful and peaceful activities aimed at securing the members of the Negro race who are residents of the State of South Carolina, of the County of Dorchester and of St. George, the full enjoyment of rights granted by the Constitution and laws of the United States. They sue individually and on behalf of all other residents of St. George who have been similarly engaged in civil rights activities, which class is too numerous to bring before the court. Plaintiffs bring this action pursuant to Rule 23 (a) (3) because there are common questions of law and fact affecting all members of the class, and because common relief is sought. The interest of said class is adequately represented by plaintiffs."

On the grounds that the said allegations are immaterial, self-serving, redundant and prejudicial.

material

Not ground - nowhere - how

2. So much of Paragraph 4 of the Complaint as attempts to define the duties and responsibilities of the Defendants therein (on the grounds that these duties are fixed by law; and further that the said allegations are redundant and extraneous; so that the said paragraph as stricken would read as follows:

Not ground

nowhere else

He goes to trial on this

Identify parties not being sued

"Defendant Jack W. Robbins is the Chief of Police of St. George; Defendant W. Duncan Horne is the Mayor of St. George; the Defendant J. Wilson Patrick is the Town Attorney of St. George, who are being sued in their official capacities and as individuals."

3. So much of Paragraph 5 of the Complaint (Claim For Relief) commencing on line 9 through the remainder of said paragraph, the portion sought to be stricken reading as follows:

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CHARLESTON, S. C.

"who are and have been deprived of these rights. In protest of the existence of discrimination, segregation and the denial of constitutional rights to the Negro citizens of St. George, plaintiffs have engaged or assisted in peaceful demonstrations, have distributed leaflets publicizing protests and boycotts, held meetings for the expression of such protests, and have peacefully picketed in an orderly fashion on the several sidewalks of St. George, all in the exercise of their rights of free speech, petition and assembly secured by Amendments I and XIV of the United States Constitution."

On the grounds that the allegations sought to be stricken are highly prejudicial to these Defendants, are phrased in such vague and general terms that Defendants cannot properly respond thereto and constitute conclusions, in addition to being self-serving declarations.

4. All of Paragraph 6 except the last line thereof on the ground that the Ordinance, copy of which is attached to the Complaint, speaks for itself.

5. All of Paragraph 7 on the ground that the same constitutes argument of counsel and has no proper place in the pleadings.

6. All of Paragraph 9 on the ground that the person named therein is not a party to this action and therefore the allegations of said paragraph are entirely irrelevant and constitute extraneous matter prejudicial to these Defendants.

7. All of Paragraph 10 on the same ground set forth as to Paragraph 9 (see above), and on the further ground that the same refers to proceedings taken in another case and refers to a petition filed in that case and other extraneous matters.

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8. So much of Paragraph 11 as defines "CORE" as being "an organization dedicated to the advancement of equal rights for all races" on the grounds that this is a self-serving declaration prejudicial to these Defendants; also, so much of Paragraph 11 commencing on the 6th line with the words "the car" through the remainder of said paragraph on the grounds that the same attempts to state a lengthy narrative of evidentiary matters which have no part in these proceedings and which are prejudicial to these Defendants, the portion sought to be stricken reading as follows:

"The car was lawfully parked in a parking meter zone. The arrest warrant charges the defendants with violation of the picketing ordinance in that they are said to have been engaged in supervising the activity of the picket line which was less than 300 feet away. The defendants Victoria De Lee and Anna William had not conversed with any of the four picketeers from the inception of the picketing that morning. The defendants Dianne Grant, age 15 and Edna De Lee, age 14 have never acted in a supervisory capacity in connection with any picketing activity; indeed they have never been on the picket line."

9. All of Paragraphs 12, 13, 14 and 15 on the grounds that these allegations have no proper place in the Complaint (Claim For Relief) in that they state what the Plaintiffs desire, are argumentative, and are evidentiary matters and conclusions and argument of counsel.

10. So much of the Prayer For Relief as is affected by the matters sought to be stricken.

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Rule 2(e)

C. MOTION FOR A MORE DEFINITE STATEMENT

In the event the Court fails to grant the relief sought in the above Motion to Dismiss and Motion to Strike in whole or in part, then the Defendants move the Court that the Complaint, Claim For Relief and Prayer For Relief be amended so as to separately state in clear and concise form as required by the Federal Rules of Civil Procedure each and every cause of action attempted to be set out in the Complaint.

1 c/f

"POINT OUT DEFECTS + DETAILS DESIRED"

Respectfully submitted,

WALKER, WALKER & JENKINS

By S/ Sidney B. Jones, Jr.
Sidney B. Jones, Jr.
Guerin Building
Summerville, South Carolina

BARNWELL, WHALEY, STEVENSON & PATTERSON

By S/ Ben Scott Whaley
Ben Scott Whaley
5 Exchange Street
Charleston, South Carolina

Attorneys for Defendants

October 22nd, 1965.

A TRUE COPY. ATTEST.
Helen Breeland
CLERK OF U.S. DISTRICT COURT
EAST. DIST. SO. CAROLINA

BARNWELL, WHALEY, STEVENSON & PATTERSON
5 EXCHANGE STREET
CHARLESTON, S. C.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

CIVIL ACTION NO. 8781

ORIGINAL FILED
APR 14 1966
MILLER C. FOSTER, JR., CLERK

GENEVA TRACY, VICTORIA DE LEE, ANNA WILLIAM, OLLIE MAE UTSEY, DIANNE GRANT, by her mother and next friend, LAUREEN GRANT, EDNA DE LEE, by her mother and next friend, CORA LEE DE LEE, JAMES LEMON, by his mother and next friend, BEATRICE LEMON; on their own behalf and on behalf of all other similarly situated,

Plaintiffs,

v.

JACK W. ROBBINS, individually and as Chief of Police of the Town of St. George; W. DUNCAN HORNE, individually and as Mayor of the Town of St. George; J. WILSON PATRICK, individually and as Town Attorney for the Town of St. George; and their agents, successors, employees, subordinates and attorneys,

Defendants.

Before the United States District Court for the District of South Carolina, at Charleston, South Carolina. Robert W. Hemphill, District Judge.

Heard February 25, 1966 Decided April 13, 1966

Henry M. di Suvero, Esquire, 156 Fifth Avenue, New York, N. Y., and Russell Brown, Esquire, 39 Spring Street, Charleston, S. C., for plaintiffs. Sidney B. Jones, Jr., Esquire, of Messrs. Walker, Walker & Jenkins, Guerin Building, Summerville, S. C., and Ben Scott Whaley, Esquire, of Messrs. Barnwell, Whaley, Stevenson & Patterson, 5 Exchange Street, Charleston, S. C., for defendants.

Defendants here move for dismissal of the complaint on grounds that the complaint fails to state sufficient grounds upon which relief can be granted, and further that the complaint does not state all causes of action separately, does not present a clear and concise statement of the facts relied upon, and that the verification does not meet the standards required by the Federal Rules of Civil Procedure.

Alternatively, defendants move to strike certain allegations of the complaint on various asserted grounds.

Plaintiffs filed complaint in 1965 naming as defendants Jack W. Robbins, "individually and in his official capacity as Chief of Police" of the Town of St. George; W. Duncan Horne, "individually and in his official capacity as Mayor"; and J. Wilson Patrick, "individually and in his official capacity as Town Attorney." Jurisdiction of the court was invoked under 42 U.S.C. sections 1981, 1983, 1985, and 1988 and 28 U.S.C. sections 1343, 2201 and 2202.

Paragraph three of the complaint avers that plaintiffs are citizens of the United States, Dorchester County, South Carolina, and, some, of the Town of St. George, who are "actively engaged in lawful and peaceful activities aimed at securing to members of the Negro race . . . the full enjoyment of rights granted by the Constitution and laws of the United States," and that they sue "individually and on behalf of all other residents of St. George who have been similarly engaged in civil rights activities . . . pursuant to Rule 23 (a)(3) because there are common questions of law and fact affecting all members of the class, and because common relief is sought." [Emphasis added]

Plaintiffs submit the complaint is directed only to alleged deprivations by the defendant officers of the Town of

St. George of the plaintiffs' rights of free speech, petition, and assembly secured to them as citizens by the First and Fourteenth Amendments of the Constitution of the United States.

From the profusion and editorial confusion of factual allegations the propriety of which will be faced later it is discernible that the infringement of constitutional rights is alleged to have occurred during a Congress-of-Racial-Equality sponsored picketing demonstration on the streets of St. George during which the defendant officials were responsible for certain alleged actions and arrests made to the end of enforcing a municipal ordinance controlling picketing and demonstrating in the town. Four of the plaintiffs were arrested for violations of the ordinance. Two cases were dismissed; the other two resulted in conviction and fine in the municipal court over which the defendant Horne presided as judge.

Plaintiffs allege that unless the court declares the picketing ordinance unconstitutional and enjoins its enforcement that their constitutional rights will continue to be denied.

The prayer consists of ten specific requests for relief including preliminary injunction, temporary restraining order, permanent injunction, with measures for continuing enforcement of such orders on defendants' successors, and an ad damnum for damages resulting from the alleged unalwful acts of defendants Robbins and Horne in the amount of $50,000 each. Mindful of the wide latitude and liberality to be afforded pleading under the Federal Rules of Civil Procedure, this court must, in considering defendants' motions, weigh carefully the severity of consequences in granting the motion to dismiss. In ruling on motion to dismiss the pleading must be construed in a manner most favorable to the party against whom the

motion is made,[1] and unless there is no doubt as to the result the case should be disposed of upon hearing on the merits.[2]

Defendants submit by motion that the complaint is defective in its verification. It is signed by the attorney purportedly "on behalf of the plaintiffs because the . . . complaint deals chiefly with matters of law and legal inference from facts alleged and/or of which I as an attorney have more knowledge than the plaintiff" and attests that the contents of the complaint are true to his "own personal knowledge" or are "supported by signed statements or are stated on information and belief." The objection made is that the basis given for his signature falls short of the requirement that an attorney's signature be equivalent to a certificate of merit and good faith. Rule 11 of the Federal Rules of Civil Procedure provides that "[e]xcept when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit." Further, that the attorney's certificate need only be based on the "best of his knowledge, information, and belief there is good ground to support it." Rule 65(b) provides in effect that no temporary restraining order shall be granted without notice unless immediate and irreparable injury, loss or damage be clearly shown from facts set forth by affidavit or by verified complaint. If the verification, or the discrepancies or errors therein, are the result of ignorance, they will not be charged against plaintiffs who had to depend on whatever counsel they could get.

The lack of verification or a defective verification should not be, and is not, fatal to the complaint merely because a temporary restraining order is sought in conjunction with other

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1 Walker Distributing Co. v. Lucky Lager Brewing Co., 323 F.2d 1 (9th Cir. 1963).

2 Conley v. Gibson, 355 U.S. 41 (1957); Sidebotham v. Robison, 216 F.2d 816 (9th Cir. 1954).

forms of relief. No temporary restraining order having been issued here, and actual notice of motion having been received, the application for such order is subject to no further special procedural requirements.[3]

There appears no doubt, however, that the complaint insofar as it applies to defendants Horne and Patrick does not allege any matter which would except these defendants from the well settled immunity of judges[4] and quasi-judicial officers[5] from suit arising out of their conduct in the performance of their official duties. This doctrine also extends to conspiracy actions under 42 U.S.C. section 1985.[6]

Inasmuch as the complaint sues defendant Horne in his official capacity, alleging acts performed by him as the presiding judge of the municipal court,[7] and defendant Patrick in his official capacity as Town Attorney, alleging acts performed by him in discharge of his official duties,[8] the complaint must be dismissed as to these defendants on the grounds that no claim has been stated upon which relief can be granted.

Judicial immunity does not, however, extend to law enforcement officers[9] except perhaps in the narrow area of activity where they are only performing orders issued by the court.[10] The motion to dismiss therefore cannot be granted on this ground as to defendant Robbins.

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3 See 3 Barron & Holtzoff, Federal Practice & Procedure § 1432 (Wright's ed. 1958).

4 E.g., Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965); Rhodes v. Meyer, 334 F.2d 709 (8th Cir. 1964) cert. denied 379 U.S. 915 (1964); Agnew v. Moody, 330 F.2d 868 (9th Cir. 1964) cert. denied 379 U.S.867 (1964); Rhodes v. Houston, 202 F.Supp. 624 (D.C.Neb. 1962) aff'd per curiam, 309 F.2d 959 (8th Cir. 1962), cert. denied 372 U.S. 909 (1963)

5 Barr v. Matteo, 360 U.S. 554 (1959). See cases cited note 4 supra.

6 See Agnew v. Moody, 330 F.2d 868 (9th Cir. 1964) cert. denied 379 U.S. 867 (1964) and cases cited therein.

7 Paragraph 9 of the Complaint.

8 Paragraphs 4 and 9 of the Complaint.

9 Monroe v. Pope, 365 U.S. 167 (1961).

10 See Rhodes v. Houston, 202 F.Supp. 624, 636 (D.C.Neb. 1962) and cases cited therein.

The remaining grounds on which the motion to dismiss is based are that the complaint does not separately state the causes of action, and does not contain a short, clear, and concise statement of the claim. Federal Rule of Civil Procedure 10(b) states that "[e]ach claim founded upon a separate transaction or occurrence . . . shall be stated in a separate count . . . whenever a separation facilitates the clear presentation of the matters set forth."

Plaintiffs submit by answer to defendants motion that there is but one cause of action here pursued, and at hearing on the motion plaintiff's counsel responded:

> THE COURT: What is your cause of action?
> MR. diSUVERO: Our cause of action is that by the passage of the ordinance which is described in Exhibit A and by the several acts which have been conducted against the picketeers in the Town of St. George plaintiffs and a class that they represent have been denied their 1st and 14th Amendments rights to free speech and to free assembly. And it is that cause of action which we assert, and none other.

The court is constrained to find that if that be the intention of plaintiff the complaint fails of the requirement that a claim shall be set forth in "a short and plain statement,"[11] and that each averment shall be "simple, concise and direct."[12]

Jurisdiction of the court was invoked under 42 U.S.C. §§ 1983 and 1985 among others. Section 1983 is entitled Civil Action for deprivation of rights. Section 1985 is entitled Conspiracy to interfere with civil rights - Preventing officer from performing duties. Certainly if plaintiffs are pleading conspiracy, and it is in no other way evident, such would constitute a separate cause of action from a claim of deprivation of rights under color of law under section 1983. The complaint at best, has the appearance of a groping after a plausible excuse for according preferential treatment to some class.

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11 FED. R. CIV. PRO. 8(a).
12 FED. R. CIV. PRO. 8(e). See Barron & Holtzoff, Federal Practice and Procedure § 255 (1960).

Plaintiffs have further appended to their claims for equitable relief a claim for damages against the (remaining) defendant Robbins. The complaint does not reveal what general damages were sustained as a result of defendants acts nor does it allege special damages, which must be pleaded.[13] In a claim for the violation of constitutionally guaranteed rights damages are recoverable,[14] nominal damages may be presumed,[15] and such may in appropriate circumstances support an award of exemplary damages.[16]

However, plaintiffs here by their plea sue as a class "because of common questions of law and fact," and seek "common relief."[17] This type of action so far as it seeks damages in tort would properly be characterized as "spurious."[18] While there may be common questions of law and fact involved, the rights of members of the class are several and the action is but an invitation for all similarly situated, on whose behalf the suit is brought, to come in to enforce and protect those individual rights.[19]

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13 FED. R. CIV. PRO. 9(g); 25 C.J.S. Damages § 131 (c) (1966).

14 E.g., Flemming v. South Carolina Elec. & Gas Co., 224 F.2d 752 (4th Cir. 1955) appeal dismissed 351 U.S. 901 (1956).

15 Basista v. Weir, 340 F.2d 74 (3rd Cir. 1965).

16 Id. at 87.

17 "Common relief" under Rule 23(a)(3) is interpreted at 3 Moore's Federal Practice § 23.10 (3)[6] as meaning that "all members of the class must seek or be entitled to the same kind of relief, i.e., injunctive relief, damages . . .; one member of the class could not seek damages, another specific performance, another injunctive relief. "Common relief" means "emanating from the same original source, either by way of grant, contract, tort, or statute where the claims for beneficiaries flow from the same fountain but are allowed not in a joint judgment but in several judgments." Kainz v. Anheuser-Busch, Inc., 194 F.2d 737, 743, (7th Cir. 1952) cert. denied 344 U.S. 820 (1952). See also cases cited note 19 infra.

18 Jinks v. Hodge, 11 F.R.D. 346 (E.D.Tenn. 1951). See 3 Moore's Federal Practice § 23.03 n. 9 and § 23.10.(3) (2nd ed. 1964); 2 Barron & Holtzoff, Federal Practice & Procedure § 562.3 (Wright ed. 1961).

19 See e.g., Hurd v. Illinois Bell Tel. Co., 136 F.Supp. 125 (N.D.Ill. 1955) aff'd 234 F.2d 942 (7th Cir. 1956) cert. denied Seybold v. Western Elec. Co., 352 U.S. 918 (1956) reh. denied 352 U.S. 977 (1957) Kainz v. Anheuser-Busch, Inc., 194 F.2d 737 (7th Cir. 1952) cert. denied, 344 U.S. 820 (1952); McGrath v. Todoyasu Abo, 186 F.2d 766 (9th Cir. 1951) cert. denied 342 U.S. 832 (1951); Oppenheimer v. F.J. Young & Co., 144 F.2d 387, 390 (2nd Cir. 1944); Weeks v. Bareco Oil Co 125 F.2d 84, (7th Cir. 1941); P. W. Husserl, Inc. v. Newman, 25 F.R.D. 264 (S.C.N.Y. 1960); Athas v. Day, 186 F.Supp. 385 (D.C. Colo. 1960), 161 F.Supp. 916 (D.C. Colo. 1958); Jinks v. Hodge, 11 F.R.D. 346 (E.D. Tenn. 1951).

The rights being distinct and several each party must show the injury which entitles him to damages, and the extent of the damages to which he is entitled. See Jinks v. Hodge, 11 F.R.D. 346 (E.D. Tenn. 1951).

The fact that counsel may have attempted to present these claims under a misconceived legal theory does not work a forfeiture of these rights. The broad purpose of the adoption of the Federal Rules was well expressed in New Amsterdam Cas. Co. v. Waller, 323 F.2d 20 (4th Cir. 1963).

> They were designed for the protection of the diligent litigant who has a just cause, but who, during some stage of the proceedings, misconceived the nature of his cause or mistook his remedy. In this day, a party ought not and does not lose his right when his counsel, however formally, advances an erroneous legal theory. At 25.

If a just cause exists in fact, fair opportunity for presenting them to the court should not be lost.

There are allegations pertaining to certain individuals who are party to the suit which may, if properly plead and proved, entitle those interests to vindication by way of damages, depending upon the findings of the court or jury.

The court has wide powers of discretion under the liberal philosophy of pleading under the Federal Rules. When the interest of justice so requires the court may grant leave to amend the complaint.[20] The interests of justice would be so served in this instance.

Therefore defendants' motion to dismiss is granted as to defendants Horne and Patrick for as to them no claim has been stated upon which relief can be granted. Defendants' motion to dismiss on

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20 FED. R. CIV. PRO. 15(a).

the grounds that the complaint fails to state separately the causes of action is also granted to be effective only at the expiration of twenty days from the date of this Order during which time this court expressly retains jurisdiction and grants leave to plaintiffs within that period to amend the complaint to conform to the rules and form of pleading. Plaintiffs may pursue, within the time allowed, their individual or collective request for injunction, if they be so advised. Every means will be exhausted to give them, and each of them, their "day in court". At such time defendants may then respond by motions appropriate and well found in the amended complaint.

AND IT IS SO ORDERED.

ROBERT W. HEMPHILL

ROBERT W. HEMPHILL
United States District Judge

Anderson, South Carolina

April 13, 1966.

TRUE COPY,
TEST:

Miller C. Foster, Jr., Clerk

By: John C. Rogers

DEPUTY CLERK

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

GENEVA TRACY, VICTORIA DE LEE, ANNA WILLIAM, OLLIE MAE UTSEY, DIANNE GRANT, by her mother and next friend, LAUREEN GRANT, EDNA DE LEE, by her mother and next friend, CORA LEE DE LEE, JAMES LEMON, by his mother and next friend, BEATRICE LEMON; on their own behalf and on behalf of all other similarly situated, Plaintiffs, -versus- JACK W. ROBBINS, individually and as Chief of Police of the Town of St. George; W. DUNCAN HORNE, individually and as Mayor of the Town of St. George; J. WILSON PATRICK, individually and as Town Attorney for the Town of St. George; and their agents, successors, employees, subordinates and attorneys, Defendants.	CIVIL ACTION NO. 8781/65 NOTICE

MAY 9 1966

TO: MESSRS. WALKER, WALKER and JENKINS, GUERIN BUILDING, SUMMERVILLE, SOUTH CAROLINA, and BARNWELL, WHALEY, STEVENSON and PATTERSON, 5 EXCHANGE STREET, CHARLESTON, SOUTH CAROLINA:

PLEASE TAKE NOTICE that the undersigned attorneys for the plaintiffs will bring the annexed Motion for a Preliminary Injunction before the United States District Judge, Eastern District of South Carolina, Charleston Division, at the Federal Courthouse, Charleston on May , 1966, or at a time and date thereafter to be fixed by the said Court.

Henry M. di Suvero

Henry M. di Suvero
c/o N. Y. Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

Russell Brown
39 Spring Street
Charleston, S. C.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

GENEVA TRACY, et al,	:	
Plaintiffs,	:	CIVIL ACTION NO. 8781/65
-vs-	:	MOTION FOR PRELIMINARY INJUNCTION
JACK W. ROBBINS, et al,	:	
Defendants.	:	

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, by their complaint, move this court for a preliminary or interlocutory injunction restraining the defendant, his agents, successors, employees, subordinates, attorneys and others acting in concert or participation with him, from enforcing in any way the provisions of the picketing ordinance of St. George, and restraining him and them from interfering in any way with the plaintiffs and those associated with them in the exercise of the rights, privileges and immunities guaranteed to them by the Constitution and laws of the United States, as well as such other, additional and further relief as may appear to the Court to be equitable and just.

Plaintiffs respectfully pray that the above relief be granted.

Respectfully submitted,

Henry M. di Suvero

Henry M. di Suvero
c/o New York Civil Liberties Union
156 Fifth Avenue
New York, N. Y. 10010

Russell Brown
39 Spring Street
Charleston, S. C.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

GENEVA TRACY, VICTORIS DE LEE, ANNA WILLIAM, OLLIE MAE UTSEY, DIANNE GRANT by her mother and next friend, LAUREEN GRANT, EDNA DE LEE by her mother and next friend, CORA LEE DE LEE, JAMES LEMON, by his mother and next friend, BEATRICE LEMON; on their own behalf and on behalf of all others similarly situated,

PLAINTIFFS,

vs.

JACK W. ROBBINS, individually and as Chief of Police of the Town of St. George, and his agents, successors, employees, subordinates and attorneys,

DEFENDANTS.

CIVIL ACTION

NO. 8781/65

AMENDED COMPLAINT

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA:

The plaintiffs for their complaint, allege:

PARTIES

1. Geneva Tracy, Victoria De Lee, Anna William, Ollie Mae Utsey, Dianne Grant, Laureen Grant, Edna De Lee, Cora Lee De Lee and James Lemon are citizens of the State of South Carolina and of the United States. Plaintiffs sue individually and on behalf of all other Negro citizens in St. George, a class so numerous as to make it impracticable to bring them individually before this court. Common questions of law and fact are involved and a common relief is sought. The interest of the class is adequately represented by plaintiffs.

2. Defendant Jack W. Robbins is the Chief of Police of St. George, South Carolina. He is sued individually and in his capacity as Chief of Police of the Town of St. George. He is a citizen of the state of South Carolina.

JURISDICTION

3. The jurisdiction of the Court over the Complaint arises under Title 28 U.S.C. 1343 (3) (4), 2201, 2202; Title 42 U.S.C. 1981, 1983, 1985 and under the Constitution of the United States and in particular the First and Fourteenth Amendments thereto.

COUNT I

4. Commencing on or about August 1, 1965, plaintiffs and those associated with them, have picketed several stores in St. George.

5. Said picketing was conducted in a peaceful and orderly fashion, in small single line formations, and at no time did said picketing unduly interfere with pedestrians or vehicular traffic.

6. Said picketing was conducted so as to inform the public of racial injustices and discrimination against Negro citizens of the United States.

7. On September 13, 1965 the Town Council of the Town of St. George adopted an ordinance (hereinafter "picketing ordinance") entitled:

> AN ORDINANCE TO PREVENT UNLAWFUL PICKETING OR DEMONSTRATIONS IN THE TOWN OF ST. GEORGE, SOUTH CAROLINA: AND THE DIRECTION, MANAGEMENT, OR CONTROL OF PICKETS OR DOMONSTRATORS IN SAID TOWN; AND TO PROVIDE PENALTIES FOR VIOLATION

8. Said ordinance provides:

> Be it ordained by the Town Council of the Town of St. George, South Carolina:

Section 1. It shall be unlawful for any person or persons to picket or demonstrate in any manner which interferes with the lawful rights of pedestrians or persons lawfully upon or using the sidewalks and/or streets of the Town of St. George, S.C.; or to block, or interfere in any manner with, the entrances to or exits from stores, or other places of business or any property of any person or persons; or to fail or refuse to obey the lawful order or command of any policeman or law enforcement officer.

Section 2. It shall be unlawful for any person or persons in charge of picketing or demonstrations, or any person or persons who may be engaged in directing, placing, managing, or in anywise controlling pickets or demonstrators, picketing or demonstrations, in the Town of St. George, S.C., to be stationed within the same block where such demonstrations may be taking place or carried on; and in no event shall such person or persons be stationed or located nearer than a distance of three hundred (300) feet from the store, business or building where such pickets or demonstrators may be stationed.

Section 3. Any person violating any of the provisions of this Ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than ($10.00) ten dollars, nor more than one hundred ($100.00) dollars or imprisonment for not less than ten (10) days, nor more than thirty (30) days.

Section 4. All Ordinances or parts of Ordinances inconsistent herewith are hereby repealed.

Passed in Council this thirteenth day of September, A.D. 1965

9. Pursuant to Sections 2 and 3 of said ordinance, on September 25, 1965 at or about 9:40 a.m. in St. George, defendant arrested plaintiffs Victoria De Lee, Anna William, Dianne Grant and Edna De Lee, all of whom were seated in a parked car owned by the Congress of Racial Equality.

10. On information and belief, on September 27, 1965 said plaintiffs were tried in absentia in the Municipal Court of the Town of St. George; Victoria De Lee and Anna William were

adjudged guilty and sentenced and charges against Dianne Grant and Edna De Lee were dismissed.

11. On numerous occasions defendant or his agents have threatened plaintiffs and those associated with them with prosecution under said ordinance.

12. Plaintiffs and those associated with them desire to engage in further picketing and demonstrations in St. George so as to inform the public of racial injustices and discrimination against Negro citizens of the United States.

13. The defendant under said ordinance has subjected the plaintiffs, citizens of the United States, or caused them to be subjected to the deprivation of rights, privileges and immunities secured to them by the Constitution and laws of the United States.

14. Plaintiffs have been intimidated and hindered, and are deterred from engaging in picketing or demonstrating by the risk of arrest, prosecution and incarceration under said picketing ordinance.

15. Said picketing ordinance is unconstitutional on its face and as applied to plaintiffs, in that it violates the First and Fourteenth Amendments to the Constitution of the United States.

16. Unless this Court restrains the operation and enforcement of this unconstitutional ordinance, plaintiffs and those associated with them, who are now suffering, will continue to suffer irreparable injury in that they will continue to be deterred, intimidated, hindered and prevented from exercising elementary and fundamental Federal constitutional rights.

17. Plaintiffs have no plain, adequate or complete remedy at law.

18. This suit involves a genuine case or controversy.

COUNT II

19. Plaintiffs hereby incorporate and adopt by reference, all of the allegations set forth in Paragraphs 4 through 18 of Count I of this complaint.

20. On information and belief, on August 20, 1965, Evonne William, a Negro citizen of the United States, while picketing in a peaceful and orderly manner in front of the Piggly Wiggly store in St. George was arrested by defendant or one of his agents and was charged and subsequently convicted in the Municipal Court of the Town of St. George for having violated the predecessor picketing ordinance of the Town of St. George. A copy of said ordinance is attached hereto as Exhibit A.

21. On information and belief, on September 18, 1965, Van H. De Lee, a Negro citizen of the United States, while picketing in a peaceful and orderly manner in front of Pool's 5 & 10¢ Store in St. George, was assaulted and battered by one Howard Cooper Johnson, Sr., and defendant and his agents failed to provide said Van H. De Lee with police protection from said assault and battery.

22. Defendant has adopted and is presently pursuing a policy, practice, custom and usage of forbidding and preventing peaceful and orderly picketing and dissemination of information regarding racial discrimination in St. George.

23. The defendant under said policy, practice, custom and usage, has subjected the plaintiffs, citizens of the United States, or caused them to be subjected to the deprivation of rights, privileges and immunities secured to them by the Constitution and laws of the United States.

24. Unless this Court restrains said policy, practice, custom and usage, plaintiffs and those associated with them, who are now suffering, will continue to suffer irreparable injury in that they will continue to be deterred, intimidated, hindered and prevented from exercising elementary and fundamental Federal constitutional rights.

COUNT III

25. Plaintiffs do hereby incorporate and adopt by reference, all of the allegations set forth in paragraphs 3 through 24 of Count I and Count II.

26. On information and belief beginning on or about August 1, 1965 and continuing day to day thereafter down to and until the present day, the defendant, together with W. Duncan Horne, Mayor of the Town of St. George, J. Wilson Patrick, Town Attorney for the Town of St. George and J. Richard Bell, Superintendent of Schools of Dorchester County, under color of certain statutes of the State of South Carolina, administrative practices of school districts of Dorchester County, and ordinances of the Town of St. George, have entered into a plan or conspiracy with other persons to the plaintiffs unknown, for the purpose of depriving, directly and indirectly, to the plaintiffs and the class they represent the equal protection of the laws and the equal privileges and immunities under the laws.

27. Pursuant to this plan or conspiracy the defendant and others have attempted to and threaten to arrest, prosecute and punish plaintiffs and the class they represent for exercising fundamental Constitutional rights of picketing and demonstrating in St. George.

28. As a part of said plan or conspiracy and in furtherance and to effectuate its object and purposes, defendant and others, did:

(a) Arrest and prosecute plaintiffs Victoria De Lee, Anna William, Dianne Grant and Edna De Lee all as more fully set forth in Paragraphs 9 and 10.

(b) Arrest and prosecute Evonne William, all as more fully set forth in Paragraph 20.

(c) Refuse to transfer said Evonne William from an all Negro school (Jenkin Hill School) to a tokenly integrated white school (Harleyville-Ridgeville School) because of her picketing activities.

(d) Fail to protect Van H. De Lee from assault and battery while picketing in St. George all as more fully set forth in Paragraph 21.

(e) Threaten plaintiffs and those associated with them with arrest and prosecution under the picketing ordinance of St. George on numerous occasions.

(f) Meet in the Dorchester County Courthouse for the purpose of devising methods whereby plaintiffs would be subject to the further deprivation of their rights.

29. Pursuant to the aforesaid conspiracy or plan, the defendant and others have subjected and caused to be subjected, plaintiffs and those associated with them to the deprivation of rights, privileges and immunities secured to them by the Constitution and laws of the United States.

30. Unless this Court restrain the operation of this plan or conspiracy, plaintiffs and those associated with them will be deterred, intimidated, hindered and prevented from exercising their fundamental Constitutional rights and will suffer and will continue to suffer immediate and irreparable injury

WHEREFORE plaintiffs pray:

1. That a permanent injunction issue

(a) restraining the defendant, his agents, successors, employees, subordinates and attorneys from the enforcement, operation or execution of the picketing ordinance of St. George, and

(b) restraining the defendant, his agents, successors, employees, subordinates, attorneys, and all those acting in concert or participation with him from impeding, intimidating, hindering, preventing and punishing the plaintiffs and those associated with them from exercising the rights, privileges and immunities guaranteed to them by the Constitution and laws of the United States.

2. That a Declaratory Judgment issue declaring that the picketing ordinance of St. George is void on its face, as violative of the Constitution of the United States.

3. That pending a hearing and determination of the prayers for permanent relief, an interlocutory injunction issue restraining the defendant, his agents, successors, employees, subordinates, attorneys and others acting in concert or participation with him, from enforcing in any way the provisions of the picketing ordinance of St. George, and restraining him and them from interfering in any way with the plaintiffs and those associated with them in the exercise of the rights, privileges and immunities guaranteed to them by the Constitution and laws of the United States.

4. That plaintiffs be accorded their costs and reasonable attorney's fees, as well as such other additional and further relief as may appear to the Court to be equitable and just.

Plaintiffs respectfully pray that the above relief be granted.

Dated: May 2, 1966

New York, New York

Henry M. di Suvero

Henry M. di Suvero
c/o New York Civil Liberties Union
156 Fifth Avenue
New York, N.Y. 10010
212 - WA 9-6076

Russell Brown
39 Spring Street
Charleston, S.C.

EXHIBIT A

AN ORDINANCE TO PREVENT UNLAWFUL PICKETING IN THE TOWN OF ST. GEORGE, S.C.; AND TO PROVIDE PENALTIES FOR VIOLATIONS.

BE IT ORDAINED by the Town Council of the Town of St. George, South Carolina:

1. It shall be unlawful for any person or persons to picket or to demonstrate in any manner which interferes with the lawful rights of pedestrians or persons lawfully upon or using the sidewalks and/or streets of the Town of St. George, S.C.; or to block, or interfere in any manner with, the entrances to or exits from stores, or other places of business, or any property of any person or persons; or to fail or refuse to obey the lawful order or command of any policeman or law enforcement officer.

2. Any person violating any of the provisions of this Ordinance shall be deemed guilty of a Misdemeanor and upon conviction thereof shall be subject to a fine of not less than ten ($10.00) dollars, nor more than one hundred ($100.00) dollars, or imprisonment for not less than ten (10) days, nor more than thirty (30) days.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

GENEVA TRACY, VICTORIA DE LEE, ANNA WILLIAM, OLLIE MAE UTSEY, DIANNE GRANT by her mother and next friend, LAUREEN GRANT, EDNA DE LEE by her mother and next friend, CORA LEE DE LEE, JAMES LEMON, by his mother and next friend, BEATRICE LEMON; on their own behalf and on behalf of all others similarly situated, PLAINTIFFS vs. JACK W. ROBBINS, individually and as Chief of Police of the Town of St. George; W. DUNCAN HORNE, individually and as Mayor of the Town of St. George; J. WILSON PATRICK, individually and as Town Attorney for the Town of St. George; and their agents, successors, employees, subordinates and attorneys, DEFENDANTS	CIVIL ACTION NO. 8781/65

MEMORANDUM OF LAW

Defendants' motion to dismiss, motion to strike and motion for more definite statement in the above-entitled action must be denied as being based on insufficient grounds for the reasons discussed below.

I. DEFENDANTS' MOTION TO DISMISS THE COMPLAINT MUST BE DENIED ON THE GROUNDS THAT THE COMPLAINT CLEARLY AND CONCISELY STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED; THAT VERIFICATION OF A COMPLAINT IS NECESSARY IN CONNECTION WITH AN APPLICATION FOR A TEMPORARY RESTRAINING ORDER ONLY, AND THAT MOTION HAVING BEEN DENIED, NO PREJUDICE TO DEFENDANTS CAN RESULT; AND THAT THE MOTION IS CLEARLY FRIVOLOUS AND DILATORY.

A. The complaint states a claim upon which relief can be granted.

Rule 8(a) of the Federal Rules of Civil Procedure (hereinafter referred to as Rules) states simply that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to

relief." As was pointed out in Tahir Erk v. Glenn L. Martin Co., 116 F.2d 865 (4th Cir. 1941)(where a complaint alleging breach of a sales-agency contract was held to suggest sufficient grounds upon which relief could be granted), the court's determination of whether a pleading contains such a statement must be controlled by the letter and spirit of Rules 1 and 8(f) which provide that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action" and that "/a/ll pleadings shall be so construed as to do substantial justice."

Motions to dismiss a complaint for failure to state a claim upon which relief can be granted are disfavored in the federal courts. Rennie & Laughlin, Inc. v. Chrysler Corporation, 242 F.2d 208 (9th Cr. 1951). In considering such a motion, courts treat every allegation as admitted, and will grant the motion only where it is clear that the plaintiff would not be entitled to relief under any circumstances. Delaware Floor Products, Inc. v. Franklin Distributors, Inc., 12 F.R.D. 114 (E.D. Pa. 1951). Particularly, as Mr. Justice Cardozo said in Borden's Farm Products v. Baldwin, 293 U.S. 194, 213 (concurring opinion): "it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer." In Delaware, an action for appointment of a receiver and injunctive relief against further financial enfeeblement of the plaintiff, the court said that although it seemed gravely doubtful that the plaintiff would be able to establish such inadequacy of legal remedy to permit it to invoke equitable protection, this was not sufficient to grant a motion to dismiss the complaint. "The doubt must mature into a virtual certainty touching the untenability in all respects of the plaintiff's position," at 118. There are two important reasons for so treating motions to dismiss. First there is the consideration of a possible waste of time and the likelihood of multiple appeals if dismissal of the action should later be held to be erroenous. Delaware Floor Products, Inc. v. Franklin Distributors, Inc.,

supra; Rennie & Laughlin, Inc. v. Chrysler Corporation, supra. Secondly, the primary objective of the law is to obtain a determination of the merits of a claim and this should be based on the proofs rather than a summary decision, on the pleadings. Delaware Floor Products, Inc. v. Franklin Distributors, Inc., supra; Rennie & Laughlin, Inc. v. Chrysler Corporation, supra.

Plaintiffs' complaint in the present case alleges that their rights to free speech, assembly, and to petition for the redress of grievances under the First and Fourteenth Amendments to the United States Constitution are violated by enforcement of the ordinance entitled "An Ordinance to Prevent Unlawful Picketing or Demonstrations in the Town of St. George, S.C.; and the Direction, Management or Control of Pickets or Demonstrations in Said Town; and to Provide Penalties for Violation." They also allege the ordinance is unconstitutional on its face and that pickets have generally been harassed. The continued existence of the ordinance, with its ever present threat of enforcement, continues to violate plaintiffs' First Amendment rights. The complaint further alleges a specific instance when the ordinance has been enforced by duly authorized law enforcement officials of St. George against the plaintiffs and other instances of harassment, thus presenting a factual allegation and actual controversy between the parties to the action. Defendants' affidavits in no way contradict the facts alleged in the complaint, nor indeed could they be treated, for purposes of a motion to dismiss, as proof contradictory. Farall v. District of Columbia Amateur Athletic Union, 153 F.2d 647 (D.C. Cir. 1946).

Allegations that a plaintiff's rights under a constitution have been denied states a claim upon which relief can be granted. In Dennis v. Village of Tonka Bay, 151 F.2d 411 (8th Cir. 1945) an action was brought to enjoin enforcement of a zoning ordinance which precluded use of land which was owned by the plaintiffs, and which they had intended to use for business before enactment of the ordinance, for anything other than

by rule or statute, pleadings need not be verified...." This is an action, in part, for injunctive relief. Rule 65, pertaining to applications for injunctive relief, mentions verification only in connection with an application for a temporary restraining order. Thus, verification not being necessary for a request for a preliminary injunction or a permanent injunction, the lack of proper verification of the complaint insofar as it requests such injunctions is not a ground for dismissal. And the temporary restraining order having been denied, defendants were in no way prejudiced by a failure of proper verification with regard to the application in the complaint for that type of relief. It follows therefore, that the action cannot be dismissed for lack of proper verification.

C. The complaint contains a separate averment of plaintiffs' claim, and clearly and concisely sets forth the relevant facts in accordance with Rules 8(e) and 10(b).

Plaintiffs' claim is that their rights to free speech, assembly, and to petition for redress of grievances as guaranteed to them by the First and Fourteenth Amendments to the United States Constitution have been and continue to be violated. This is clearly indicated in paragraph 12. The complaint alleges that these rights are violated by enforcement of the picketing ordinance in question and by general harassment of plaintiffs and others similarly situated for the purpose of preventing or discouraging them from picketing, assembling, or demonstrating in the exercise of their constitutional rights.

The function of pleadings under the Rules is to give fair notice of the claim asserted so as to enable the adverse party to answer and prepare for trial. Mueller v. Rayon Consultants, Inc., 170 F.Supp. 555 (S.D.N.Y. 1959). In Original Ballet Russe Ltd. v. Ballet Theater, 133 F.2d 187 (2d Cir. 1943), the complaint alleged that defendants formed a deliberate design to destroy plaintiff's business, and in furtherance of such design induced certain dancers to break their employment contracts and circulated false statements to injure plaintiff's reputation. The

trial court, believing that the complaint alleged two separate and distinct torts (defamation and encouragement of employees to break their contracts) granted defendants' motion for an amended complaint stating and numbering separately the various causes of action. The Court of Appeals reversed stating that separation into counts was not necessary to facilitate "the clear presentation of the matters set forth" (Id. at 189). The court went on to point out that the word claim in Rule 10(b) "is used to denote the aggregate of operative facts which give rise to a right enforceable in the courts. Under Rule 10(b) a separation of claims into separate counts is mandatory only when necessary to facilitate clear presentation111," (Id. at 189). The complaint in the present case contains only one claim and allegations of fact which support it. Under the "Claim for Relief," the paragraphs clearly set out plaintiffs' activities (paragraph 5), portions of the ordinance in question (paragraph 6), the assertion of said ordinance's unconstitutionality (paragraph 7), events showing harassment of picketers (paragraphs 9-10), the events involving enforcement of said ordinance (paragraphs 8 and 11), and the continuing threat of enforcement of said ordinance (paragraphs 13-14). Some of these paragraphs must of necessity include more than one fact as it is the aggregate of several facts which constitutes the alleged violation of plaintiffs' constitutional rights. Further separation into numbered paragraphs would not only not increase the clarity of the complaint, but would tend to obscure the differentiation between each set of occurrences. "/A/ series of acts, all...contributing to the injury complained of...may be counted upon not severally but collectively, as producing that result," and may be set up as one cause of action. Original Ballet Russe, Ltd. v. Ballet Theater, supra at 189. Also, in Lehnertz v. Societe Anonyme Belge d'Exploitation de la Navigation Aerienne, 8 F.R.D. 319 (S.D.N.Y. 1948), an action to recover damages resulting from the crash of defendant's airplane, a motion to separately state and number certain paragraphs was denied. The court pointed out that the paragraphs referred to a single cause of

action which had various parts and held that the plaintiffs were not required to further separate the claim into its component parts as the allegations were sufficiently clear to enable defendant to answer properly. It is submitted that the present complaint charges with sufficient clarity that plaintiffs' rights as guaranteed by the First and Fourteenth Amendments to the United States Constitution are violated by enforcement of the picketing ordinance in question.

The above discussion shows that defendants have no grounds on which to move for dismissal of this action. The complaint clearly states a claim upon which relief can be granted, the averments are logically and concisely set forth in separate numbered paragraphs as far as is practicable, and the application for a temporary restraining order having been denied, no prejudice can be said to have resulted to defendants due to lack of proper verification of the complaint. It is clear then that this motion has been made as a dilatory tactic and is frivolous. "The teaching of pleading embodied in the Federal Rules dictates the elimination of all pleading devices which simply permit strategic maneuvering by counsel. Since the 12(e) motion is prone for implementation of barristerial shadow boxing, its existence should be cast in the mold of strictest necessity." Lincoln Laboratories v. Savage Laboratories, 26 F.R.D. 141, 142 (D. Del. 1960). It follows therefore that defendants' motion to dismiss must be denied.

II. DEFENDATS' MOTION TO STRIKE CERTAIN PORTIONS OF PLAINTIFFS' COMPLAINT MUST BE DENIED ON THE GROUNDS GIVEN BELOW.

The motion to strike is a disfavored motion. Bloombury Woolen Co. Inc. v. Moosehead Woolen Mills, Inc., 109 F.Supp. 804 (D. Maine N.D. 1953); Kraus v. General Motors Corporation, 27 F.Supp. 537 (S.D.N.Y. 1939). It is well established that the action of striking a pleading is a "drastic" remedy to be sparingly used by the courts, Brown & Williamson Tobacco Corp. v. United States, 201 F.2d 819 (6th Cir. 1953), and the contents of a pleading should be permitted to stand unless it is clear that it can have

no possible bearing on the subject matter of the litigation. Bloombury Woolen Co. Inc. v. Moosehead Woolen Mills, Inc., supra. "If there is any doubt as to whether under any contingency the matter may raise an issue the motion should be denied." Bloombury Woolen Co. Inc. v. Moosehead Woolen Mills, Inc., supra at 806. As the court in Kraus indicated, such motions must be considered in the light of Rule 8(f) which provides that "/a/ll pleadings shall be so construed as to do substantial justice."

Rule 12(f) which pertains to motions to strike states the grounds upon which such motions may be made as follows: "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Defendants seek to strike material in paragraphs 3, 5, and 11 on the ground, inter alia, that it is "self-serving." "Self-serving," it will be noted, is not included in the above-cited Rule, and therefore is not a ground upon which defendants may move to strike these portions of the complaint.

Defendants also object to paragraph 3 on the grounds that matter contained therein is immaterial, redundant and prejudicial. Paragraph 3 generally identifies the plaintiffs, states that this is a class action brought pursuant to Rule 23(a)(3), and makes the necessary allegations in accordance with that Rule. It cannot seriously be contended that such identification and allegations complying with the requirements of the Rules for this type of action are immaterial. Nor is this concisely stated material redundant. Furthermore, on a motion to strike, the movant should show that he will be prejudiced if the attached allegations are left in the pleadings. American Machine & Metals, Inc., v. De Bothezat Impeller Co., Inc., 8 F.R.D. 306 (S.D.N.Y. 1948) (action for declaratory judgment in which a motion to strike defenses from plaintiff's reply to defendant's counterclaim was denied in part where issues of law and fact were raised and no prejudice was shown). Defendants have merely alleged prejudice, but have significantly failed to show, in either the motion to strike or

the supporting affidavits, in what way prejudice results. The motion therefore should not be granted on the mere allegation of prejudice.

Defendants object to portions of paragraph 4 as attempting to define the duties and responsibilities of defendants, which are fixed by law, and as being redundant and extraneous. These allegations in no way attempt to define the scope of defendants' duties, but merely identify which aspects of their respective positions are relevant to the case at bar. They are therefore neither redundant nor extraneous. Even if they should be considered as setting more than is required, it cannot be contended that they have no bearing on the subject matter of the litigation, nor is it contended that defendants are in any way prejudiced thereby. They should therefore be permitted to stand. See Kraus v. General Motors Corporation, supra.

Portions of Paragraph 5 are objected to on the grounds that they are vague and general, constitute conclusions and are prejudicial. That they may be "vague and general" is not a ground for striking. In Dionne v. Erie Concreet & Steel Supply Co., 97 F.Supp. 441 (W.D. Pa. 1951), a motion to strike on the ground of lack of particularity was denied, the court pointing out that the defendant could file an answer which denied any allegations as to which proof was required and then make full use of the discovery procedures provided for in the Rules. Similarly, in view of the preference for leaving pleadings undisturbed, it would be more appropriate to permit the allegations in question in the present case to stand and to require defendants to use the discovery procedures to obtain whatever further information they believe necessary to prepare for trial.

That the paragraph contains conclusions does not necessitate the granting of the motion to strike either. In Citron v. Greater New York Industries, Inc., 79 F.Supp. 692 (S.D.N.Y. 1948), a stockholder's derivative action, a motion to strike certain paragraphs from the complaint as being nothing more than mere generalizations and conclusions was denied since it

could not be said that the allegations had no relation to the controversy or that a failure to strike would unduly prejudice the defendant. In the present case, allegations that the plaintiffs and those similarly situated have exercised their constitutional rights by actively engaging in protests against racial discrimination are related to the question of harassment raised by the pleadings. Since defendants have merely alleged but failed to demonstrate prejudice by the inclusion of these allegations, they should be permitted to remain in the complaint. See American Machine & Metals, Inc. v. De Bothezar Impeller Co., Inc., supra. Furthermore, conclusions of law are sometimes the easiest and simplest way of stating a claim for relief. This is shown by the fact that the approved forms for use in federal courts are replete with conclusions of law. See for example Official Forms Nos. 4-10.

Defendants further object to portions of Paragraph 6 which discusses the picketing ordinance charged to be unconstitutional. This matter was included to point to the objectionable aspects of the ordinance. In Gross v. Independence Shares Corporation, 36 F.Supp. 541 (E.D. Pa. 1941), an action brought under the Securities Act of 1933, a motion was made to strike a paragraph setting forth part of the Act. The court said that although it took judicial notice of all acts of Congress and that therefore it was, technically speaking, redundant, it was not prejudicial to the defendant, nor would it prove a burden to answer, and denied the motion. Since it is not contended that discussion of portions of the picketing ordinance in any way prejudices defendants, the motion to strike this portion of the complaint in the instant case should likewise be denied.

Paragraph 7 does not constitute argument of counsel as maintained by defendants. It merely alleges that the ordinance in question is unconstitutional on its face and presents the theories on which this allegation is based.

Objection is made to paragraphs 9 and 10 on the grounds that the

persons named therein are not parties to the action, that reference is made to proceedings in another action, and that the allegations are therefore irrelevant, extraneous and prejudicial. These do not constitute valid grounds for a motion to strike this matter. This is a class action on behalf of the Negro citizens of Dorchester County and the persons named in those paragraphs are members of that class. Thus, while they are not technically parties to the action, allegations of incidents involving them must be deemed to be relevant. These allegations raise the question of the harassment of picketers in the exercise of their constitutional rights under the First and Fourteenth Amendments. This issue constitutes an integral part of the action and therefore the allegations in question should not be stricken. The mere fact that reference is made to proceedings in another action is not considered a justifiable ground for striking. In A.B. Dick Co. v. Marr, 9 F.R.D. 99 (S.D.N.Y. 1949), a motion was made to strike portions of the defendants' petition which recited the history of criminal and civil actions against the defendant. In denying the motion, the court said that the actions might possibly play an important role in the history of the issue about to be tried and that there was no apparent reason why the trial judge should not be aware of them. Plaintiffs' contend that the question of the previous arrests of William and DeLee are relevant to the issue of harassment and therefore the references thereto should be allowed to remain a part of the complaint.

Defendants claim that the designation of CORE, in Paragraph 11, as "an organization dedicated to the advancement of equal rights for all races" is prejudicial. It is difficult to see how this could possibly be prejudicial to members of any race unless those members themselves were acting to thwart such advancement, which action would not be in accordance with the mandates of the United States Constitution.

Secondly, defendants object to substantially all of the remainder of Paragraph 11 as being evidentiary and therefore prejudicial. However,

they do not indicate either in the motion to strike or supporting affidavits in what way this matter is prejudicial. See American Machine & Metals, Inc. v. De Bothezar Impeller Co., Inc., supra.

This is an action for injunctive relief and it is therefore necessary to set forth the specific acts which are relied upon as the basis for relief. Bowles v. Deep Vein Connellsville Coke Co., Brier Hill, Pa., 5 F.R.D. 140 (W.D. Pa. 1946). Bowles involved an action for injunctive relief for alleged violation of Emergency Price Control Act. A motion for a bill of particulars was granted in the absence of an allegation setting forth the maximum price schedule of the most closely competitive producer, or the names of persons, times and prices charged during the period involved. The court said that if a permanent injunction were to be granted, it would be favorably considered because of specific acts and misconduct on the part of the defendant and that therefore such acts must be alleged as the basis upon which relief would be granted.

It is appropriate to have evidentiary allegations in a complaint. After all, federal pleading is fact pleading. Bloombury Woolen Co. Inc. v. Moosehead Woolen Mills, Inc., supra. Also in Boerstler v. American Medical Association, 16 F.R.D. 437 (N.D. Ill. 1954), an action for injunctive relief against an alleged conspiracy in violation of anti-trust laws, the court said that where no prejudice was shown, it would not strike portions of the pleading even though in that case it was prolix and contained evidentiary matter. It went on to say that only gross violations of Rule 8 warranted granting of a motion to strike and suggested as examples of such violations pleadings containing 154 paragraphs in one case and 260 pages in another. Thus, even if the court should find that portions of paragraph 11 are evidentiary, it must find that they are both necessary and appropriate.

Defendants also move to strike all of paragraphs 12, 13, 14, and 15 on

the grounds, inter alia, that they state what plaintiffs desire. This is not a ground for striking under the Rules. Even if the complaint sets out more than is required to sustain the action, to eliminate all material, which upon critical analysis "might seem irrelevant or redundant, would endanger the structure upon which plaintiffs' cause of action is founded." Kraus v. General Motors Corporation, supra at 541. Plaintiffs further deny that the material contained therein is argumentative. It simply points out in what way plaintiffs' rights are violated. As to the objection that it is evidentiary, see Bowles v. Deep Vein Connellsville Coke Co., Brier Hill, Pa., supra, and Bloombury Woolen Co., Inc. v. Moosehead Woolen Mills, Inc., supra; and that it contains conclusions, see Citrin v. Greater New York Industries, Inc., supra. In the light of the cases discussed above and the fact that motions to strike are to be sparingly used, it is respectfully submitted that the motion be denied. The entire complaint should be allowed to remain as is; there is no cause to strike any portion of the Prayer for Relief.

III. DEFENDANTS' MOTION FOR MORE DEFINITE STATEMENT MUST BE DENIED ON THE GROUND THAT THE COMPLAINT STATES CLEARLY AND CONCISELY THE SINGLE CLAIM UPON WHICH PLAINTIFFS BASE THEIR REQUEST FOR RELIEF AND ALSO BECAUSE DEFENDANTS' MOTION AND SUPPORTING AFFIDAVITS FAIL TO POINT OUT THE DEFECTS COMPLAINED OF AND THE DETAILS DESIRED.

Rule 12(d) provides as follows:

> If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired.

The complaint in this action is neither vague nor ambiguous. As was discussed under I. C. of this memorandum, the complaint clearly charges that the picketing ordinance is unconstitutional on its face in that it is excessively vague, uncertain, and overbroad, states clearly the instances in which it has been enforced in violation of plaintiffs' constitutional rights and makes a demand for relief. The test of sufficiency of pleading

was set forth in Gins v. Mauser Plumbing Supply Co., 148 F.2d 974 (2d Cir. 1945) (an action in bankruptcy in which a dismissal on the merits of an overpleaded complaint was reversed):

> A simple statement in sequence of the events which have transpired, coupled with a direct claim by way of demand for judgment of what the plaintiff expects and hopes to recover, is a measure of clarity and safety.... At 976.

This complaint meets that test and there is nothing to prevent defendants from reasonably framing a responsive pleading. In fact, nowhere in the affidavits in support of the motion can there be found any specific mention of vagueness or ambiguity as required by Rule 12(e). In National Cold Storage Co. Inc. v. Port of New York Authority, 24 F.R.D. 404 (S.D.N.Y. 1959), there was also a failure to point out any specific vagueness or ambiguity in either the motion for more definite statement or the supporting affidavit. In denying the motion the court placed great emphasis on this failure. As stated in McBeath v. Pierce, 13 F.R.D. 143, 144 (D. Neb. 1952), a malpractice proceeding in which a motion for more definite statement was denied, a defendant may not "by preliminary pleading, compel [the plaintiff] to restate his claim with the exactness and precision which may suit the convenience or taste of the adversary.

It is respectfully submitted that there are no grounds to support this motion and it too must be denied as a dilatory tactic.

CONCLUSION

For the above-stated reasons, defendants' motions to dismiss, strike and for more definite statement must all be denied in their entirety.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

GENEVA TRACY, VICTORIA DE LEE, ANNA WILLIAM, OLLIE MAE UTSEY, DIANNE GRANT by her mother and next friend, LAUREEN GRANT, EDNA DE LEE by her mother and next friend, CORA LEE DE LEE, JAMES LEMON, by his mother and next friend, BEATRICE LEMON; on their own behalf and on behalf of all others similarly situated,

PLAINTIFFS

vs.

JACK W. ROBBINS, individually and as Chief of Police ofthe Town of St. George; W. DUNCAN HORNE, individually and as Mayor of the Town of St. George; J. WILSON PATRICK, individually and as Town Attorney for the Town of St. George; and their agents, successors, employees, subordinates and attorneys,

DEFENDANTS

ANSWER

CIVIL ACTION

NO. 8781/65

Plaintiffs by their attorneys answer the motion to dismiss, motion to strike, and motion for more definite statements herein as follows:

A. Motion to dismiss

Defendants' motion to dismiss the complaint must be denied on the following grounds:

FIRST: that the complaint states a claim upon which relief can be granted in that it alleges that plaintiffs' rights

to free speech, assembly and to petition for redress of grievances as guaranteed by the First and Fourteenth Amendments to the United States Constitution have been and continue to be violated;

SECOND: that verification of a complaint is necessary in connection with an application for a temporary restraining order only, and that motion having been denied, no prejudice to defendants can result;

THIRD: that the complaint separately states plaintiffs' cause of action in paragraph 12 and contains a clear and concise statement of the facts upon which the cause of action is based.

B. Motion to strike

Defendants' motion to strike portions of the complaint must be denied on the following grounds:

FOURTH: that "self-serving" is not a ground upon which defendants may move to strike material from paragraphs 3, 5, and 11.

FIFTH: that defendants have failed to show in what way any of the allegations in paragraphs 3, 5, 9, 10, and 11 are prejudicial;

SIXTH: that the allegations contained in paragraphs 3, 4, 5, 7, 9, 10, 11, 12, 13, 14, and 15 are not immaterial, redundant, extraneous, vague and general, conclusory, argumentative, irrelevant, or evidentiary;

SEVENTH: that the inclusion of portions of the picketing ordinance in paragraph 6 is not a ground upon which defendants

may move to strike such material;

EIGHTH: that the inclusion of what plaintiffs desire is not a ground upon which defendants may move to strike paragraphs 12, 13, 14, and 15;

NINTH: that consequently there is no cause to strike any portion of the Prayer for Relief.

C. Motion for more definite statement

Defendants' motion for more definite statement must be denied on the following grounds:

TENTH: that the complaint states clearly and concisely the single claim upon which plaintiffs base their request for relief;

ELEVENTH: that the defendants have not pointed out the defects complained of and the details desired.

WHEREFORE, plaintiffs demand that defendants' motions to dismiss, to strike and for more definite statement be denied.

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BRIEF OF APPELLEES

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 10,718

GENEVA TRACY, VICTORIA DeLEE, ANNA WILLIAM, OLLIE MAE UTSEY, DIANNE GRANT, BY HER MOTHER AND NEXT FRIEND, LAUREEN GRANT, EDNA DeLEE, BY HER MOTHER AND NEXT FRIEND, CORA LEE DeLEE, JAMES LEMON, BY HIS MOTHER AND NEXT FRIEND, BEATRICE LEMON; ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, APPELLANTS,

against

W. DUNCAN HORNE, INDIVIDUALLY AND AS MAYOR OF THE TOWN OF ST. GEORGE; J. WILSON PATRICK, INDIVIDUALLY AND AS TOWN ATTORNEY FOR THE TOWN OF ST. GEORGE; AND THEIR AGENTS, SUCCESSORS, EMPLOYEES, SUBORDINATES AND ATTORNEYS, APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT FOR THE DISTRICT OF SOUTH CAROLINA

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BRIEF OF APPELLEES

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against

W. DUNCAN HORNE, INDIVIDUALLY AND AS MAYOR OF THE TOWN OF ST. GEORGE; J. WILSON PATRICK, INDIVIDUALLY AND AS TOWN ATTORNEY FOR THE TOWN OF ST. GEORGE; AND THEIR AGENTS, SUCCESSORS, EMPLOYEES, SUBORDINATES AND ATTORNEYS, APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT FOR THE DISTRICT OF SOUTH CAROLINA

STATEMENT OF THE CASE

Appellees do not object to the Statement of the Case—"Procedural History" as contained in appellants' brief.

QUESTION INVOLVED

Are not a municipal judge and a town attorney immune from liability in a Civil Rights suit arising out of their conduct in the performance of their official duties?

COUNTER STATEMENT OF FACTS

Since we are not in agreement with appellants' statement of facts, we believe a short concise statement of facts applicable to the sole question involved and discussed in this brief may be helpful to the Court. We believe the facts stated in the opinion of the District Judge in deciding this motion portray a clearer picture of the matters involved than are presented by appellants. We, therefore, quote applicable portions from his Honor's opinion as follows:

"Plaintiffs filed complaint in 1965 naming as defendants Jack W. Robbins, 'individually and in his official capacity as Chief of Police' of the Town of St. George; W. Duncan Horne, 'individually and in his official capacity as Mayor'; and J. Wilson Patrick, 'individually and in his official capacity as Town Attorney.' Jurisdiction of the court was involved under 42 U. S. C. Sections 1981, 1983, 1985, and 1988 and U. S. C. Sections 1343, 2201, 2202. "Paragraph three of the complaint avers that plaintiffs are citizens of the United States, Dorchester County, South Carolina, and some, of the Town of St. George, who are 'actively engaged in lawful and peaceful activities aimed at securing to members of the Negro race * * * the full enjoyment of rights granted by the Constitution and laws of the United States', and that they sue 'individually and on behalf of all other residents of St. George who have been similarly engaged in civil rights activities * * * pursuant to Rule 23 (a) (3) because there are common questions of law and fact affecting all members of the class, and because **common relief is sought.** (Emphasis added.)

"Plaintiffs submit the complaint is directed only to alleged deprivations by the defendant officers of the Town of St. George of the plaintiffs' rights of free speech, petition, and assembly secured to them as citizens by the First and Fourteenth Amendments of the Constitution of the United States.

". . . it is discernible that the infringement of constitutional rights is alleged to have occurred during a Congress-of-Racial-Equality sponsored picketing demonstration on the streets of St. George during which the defendant officials were responsible for certain alleged actions and arrests made to the end of enforcing a municipal ordinance controlling picketing and demonstrating in the town. Four of the plaintiffs were arrested for violations of the ordinance. Two cases were dismissed; the other two resulted in conviction and fine in the municipal court over which the defendant Horne presided as judge." (Ap. 1a-3a.)

On these facts, the District Court then dismissed appellants' complaint as to the defendants Horne and Patrick under the rule of immunity of judicial officers, and *quasi*-judicial officers, for their acts performed in their official capacities.

ARGUMENT

I

Are not a municipal judge and a town attorney immune from liability in a Civil Rights suit arising out of their conduct in the performance of their official duties?

In their brief, appellants do not press their claims against appellees as individuals but only as officers of a state court (*i. e.,* judge of a municipal court and town attorney) acting respectively in a judicial or *quais*-judicial capacity. Therefore, the immunity of such officers from civil actions is the controlling question here, and appellees' argument shall be directed to that point.

RULE OF JUDICIAL IMMUNITY

The appellants rely on *Picking v. Pennsylvania Railroad Co.,* 3 Cir., 1945, 151 F. (2d) 240, and cases folowing that decision.

In *Tate v. Arnold,* 1955, 8 Cir., 223 F. (2d) 782 at page 785, it was asserted that ~~counts~~ courts generally have refused to accept as correct the holding in *Picking v. Penn. R. Co.,* 1945, 3 Cir., 151 F. (2d) 240, 250, wherein it was held that Congress, by enacting the Civil Rights Act, *sub judice,* intended to abrogate the immunity of judicial officers from civil actions. It was pointed out by Judge Woodrough that the courts which have rejected the authority of the *Picking* case have based their reasoning primarily upon the decision of the Supreme Court in *Tenney v. Brandhove,* 341 U. S. 367, 81 S. Ct. 783, 94 L. Ed. 1019 (1961), which was announced several years after the pronouncements of the Court of Appeals for the Third Circuit in the *Picking* case.

In *Tenney v. Brandhove, supra,* the Supreme Court held that when a legislative committee was acting within a field in which it had power to act, the civil rights statutes impose no civil liability upon the legislators for conduct charged to have stemmed from improper motives. In *Tate v. Arnold, supra,* attention was called to the fact that the United States District Court for Western Pennsylvania had held the decision in the *Picking* case to be no longer binding in that circuit. *Ginsburg v. Stern,* 1954, W. D. Pa., 125 F. Supp. 596; *United States ex rel. Peters v. Carson,* 1954, W. D. Pa., 126 F. Supp. 137. The opinions in both these cases were written in scholarly but vigorous fashion by Chief District Judge Gourley. In *Ginsburg v. Stern,* 125 F. Supp. at pages 601-602, he said:

> "It would appear incongruous and contradictory to the doctrine of judicial independence, to hold that judicial officers of a state stand in a less favorable position than

do state legislators, in respect to immunity from civil liability for acts done in their official capacity.

I have no doubt that the Third Circuit would no longer feel obliged, as it did in the Picking case, to read the Civl Rights Act in such literal and unqualified manner as to impose a liability for damages upon a state judicial officer for acts done in the exercise of his judicial function. (Emphasis added.)

It is axiomatic that the same immunity which applies to state legislators in the performance of their legislative duties would have application to the official acts of judges."

Francis v. Crafts, 1953, 1 Cir., 203 F. (2d) 809, 811, and *Cobb v. City of Malden,* 1953, 1 Cir., 202 F. (2d) 701, were cited. The same language was used in *United States ex rel. Peters v. Carson,* 1954, 126 F. Supp. at page 412.

In *Francis v. Crafts,* 1953, 1 Cir., 203 F. (2d) 809, the Court, at page 812, said:

"We do not think that *Picking v. Pennsylvania R. Co.,* 3 Cir., 1945, 151 F. (2d) 240, is a controlling authority. In the first place, the judicial officer involved in that case was a justice of the peace, not a judge of a court of general jurisdiction, as in the case at bar. A possible distinction might be taken on this score, but see *Pratt v. Gardner,* 1848, 2 Cush., Mass., 63, 70. More important, the *Picking* case was decided in 1945, without benefit of the illumination and compelling analogy to be found in the opinion of the Supreme Court in *Tenney v. Brandhove, supra,* which came down several years later. In view of the discussion in the latter case, we have no doubt that the Third Circuit would no longer feel obligated, as it did in the *Picking* case, to read the Civil Rights Act in such literal and unqualified manner as to impose a liability for damages upon a state judicial officer for acts done in the exercise of his judicial function. **Certainly it would be absurd to hold, in the application of the Civil Rights Act, that judicial officers of a state stand in any less favorable position than do state legislators in respect to immunity from civil lia-**

bility for acts done in their official capacity." (Emphasis added.)

The *Picking* case was also soundly criticized in *Francis v. Lyman, et al.*, 1952, D. C. Mass., 108 F. Supp. 884, 887:

"Where is the end, if *Picking* is correct as to judges acting within their authority?"

The decisions in *Souther v. Reid*, 1951, D. C. Va., 101 F. Supp. 806 (opinion by Judge Bryan), and *Morgan v. Sylvester*, 1954, D. C. N. Y., 125 F. Supp. 380, indicates that the *Picking* decision was incorrect.

The opinion in *McShane v. Moldovan*, 1949, 6 Cir., 172 F. (2d) 1016, in its reference to the *Picking* opinion, did not constitute a holding grounded upon acceptance of its interpretation of the Civil Rights Act. The important question for decision in the *McShane* case was, as stated by the court, 172 F. (2d) at page 1019, "whether the allegations of the complaint disclosed that appellees, in their alleged conduct, acted 'under color of law.' " The *Picking* opinion was cited as bearing on that question, not on the question of judicial immunity. Although a justice of the peace was one of the defendants in the *McShane* case, the case involved an alleged conspiracy among the justice of the peace, a complaining witness, a constable and others. The defendants were considered as a group of conspirators, with no separate consideration being given to them individually. The question of judicial immunity was not raised by the defendant justice of the peace. In any event, any implied ruling on the question of judicial immunity in a case not involving a conspiracy must yield to the later ruling of the Supreme Court in *Tenney v. Brandhove, supra.*

A study of the above citations indicates that the best view is that a judge's immunity to civil suits for acts performed by him in his judicial capacity protects him for acts under the Civil Rights Act.

The Courts have long recognized the rule that where a judge has jurisdiction over the subject matter and the person, he is not liable civilly for acts done in the exercise of his judicial function, even though he acts erroneously, illegally, or irregularly, or even corruptly. *Brictson v. Woodrough,* 1947, 8 Cir., 164 F. (2d) 107; *Francis v. Lyman, et al.,* D. C. Mass., 108 F. Supp. 884. See also, *Papagianakis, et al. v. The Samos, et al.,* 1950, 4 Cir., 186 F. (2d) 257; *Gregorie v. Biddle,* 1949, 2 Cir., 177 F. (2d) 579. Cf., *Gibson v. Reynolds, et al.,* 1949, 8 Cir., 172 F. (2d) 95; *Gibson v. Reynolds,* 1948, D. C. Ark., 77 F. Supp. 629; *Cuiksa v. City of Mansfield,* 1957, 6 Cir., 250 F. (2d) 700; *Yaselli v. Goff,* 1926, 12 F. (2d) 396, 56 A. L. R. 1239.

While the appellants in their brief do not directly attack the jurisdiction of the municipal court over the subject matter involved, and the persons of appellants, we wish to point out that the defendant, W. Duncan Horne, had jurisdiction over the persons of such of the appellants as were convicted or fined in the municipal court over which he presided as judge.

Article V, Section 1, of the South Carolina Constitution of 1895 * grants to the General Assembly power to establish

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* ARTICLE V
JUDICIAL DEPARTMENT

Section 1. Judicial power vested in certain courts.—The Judicial power of this State shall be vested in a Supreme Court, in two Circuit Courts, to wit: A Court of Common Pleas having civil jurisdiction and a Court of General Sessions with criminal jurisdiction only. The General Assembly may also establish County Courts, Municipal Courts and such Courts in any or all of the Counties of this State inferior to Circuit Courts as may be deemed necessary, but none of such Courts shall ever be invested with jurisdiction to try cases of murder, manslaughter, rape or attempt to rape, arson, commonlaw burglary, bribery or perjury; Provided, Before a County Court shall be established in any County it must be submitted to the qualified electors and a majority of those voting must vote for its establishment. Provided, further, that the General Assembly shall establish a County Court for the County of Orangeburg whose jurisdiction shall be fixed by law within the limits above provided for County Courts; the Judge of the County Court for the County of Orangeburg shall be appointed by the Governor upon recommendation of a majority of the members of the Orangeburg County Bar Association for a term of four years, who shall continue in office until his successor shall qualify, and

such courts "inferior to Circuit Courts," as it may deem necessary. *Glymph, et al. v. Smith, et al.,* 170 S. C. 486, 170 S. E. 913 (1933). A municipal court is an inferior court within the meaning of the Constitution. *City Council v. Fowler,* 48 S. C. 8, 25 S. E. 900 (1898).

Thereafter, pursuant to the constitutional authority granted, the General Assembly enacted what is now Section 15-901 of the 1962 Code of Laws, reading as follows:

> "Section 15-901. Mayor or intendant has powers of magistrate in criminal cases. The intendants or mayors of the cities and towns of this State shall have all the power and authority of magistrates in criminal cases within the corporate limits and police jurisdiction of their respective cities and towns and shall especially have the power and authority to try speedily all offenders against the ordinances or laws of the city or town in a summary manner and without a jury, unless demanded by the accused. A mayor or intendant pro tempore shall have the same powers."

Section 15-905, prescribing penalties in case of convictions, reads:

> "Section 15-905. Penalties. Whenever the mayor, intendant or mayor pro tempore shall find the party tried before him guilty of violating an ordinance of the city or town he may impose, in his discretion, a fine or imprisonment in the alternative, not to exceed the limits prescribed for such violation by the ordinances of the city or town and not to exceed a fine in the sum of one hundred dollars or imprisonment for not more than thirty days; provided, such ordinances,

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whose compensation shall be not less than sixty per cent of the salaries of Judges of Circuit Courts; and upon request of the County Judge or upon petition of a majority of the members of the Orangeburg County Bar Association, the Governor may appoint special judges to preside over the Court and perform any of the duties of the office whenever there may be necessity for such appointment; provided, however, that the General Assembly may abolish or re-establish the County Court of Orangeburg County, from time to time, upon a majority vote of the qualified electors of the County.

rules, bylaws or regulations be not contrary to the laws of the State."

It was under these statutes that certain of the appellants were tried and convicted before the municipal judge, acting within the scope of the jurisdiction conferred upon him.

Appellants argue, however, that because the ordinance was unconstitutional, appellees were guilty of illegal conduct in enforcing the ordinance, and can be held civilly liable in damages.

"**A. Civil Liabilities—1. For Official Acts— a. In General.** Subject to some qualifications of the rule where judges of inferior jurisdiction are concerned, no person is liable civilly for what he may do as judge while acting within the limits of his jurisdiction, nor is he so liable for neglect or refusal to act. The rule is especially true where the judge is one having general jurisdiction, and, in such case, there is no liability, even though he exceeds his authority, or even though it is a case in which the judge is called upon to decide whether or not a particular case is within his jurisdiction, and he falls into error in arriving at that conclusion. Where a judge has full jurisdiction of the subject matter and of the parties, he is not liable civilly where he acts erroneously, illegally, or irregularly, and he is not chargeable with costs resulting from his erroneous rulings, or the cost of a proceeding to prohibit erroneous action on his part; nor is he liable for a failure to exercise due and ordinary care. Where the circumstances are such that the judge would otherwise be exempt from a civil action, as a general rule, he is not liable, although he has acted maliciously or corruptly. For the corrupt acts of a judge of general jurisdiction the only remedy is by impeachment. Where a judge acts wholly without jurisdiction of the parties or the subject matter, he is subject to civil action for any damage resulting therefrom, whether he has acted maliciously or not." 33 C. J. 981, Sec. 115.

Appellants, in their brief, page 12, claim that the District Court erred in dismissing the complaint against Horne as Mayor. In their complaint, however (Paragraph 4, App. 11 a), it is specifically alleged that his duties as Mayor are "to take care that the laws and ordinances thereof (*i. e.*, of the muncipality) are executed." The qualifying allegations that "he is authorized, empowered and directed by and under the statutes of the State of South Carolina to have superintending control of all of the officers and affairs of the municipality" are entirely too vague and general to constitute allegations of fact.

Under well recognized rules of pleading, vague generalities not based on specific facts are not admitted as true on a motion to dismiss, since plaintiff must allege facts which support his claim. *Spielman Motor Sales Co. Inc. v. Dodge,* 295 U. S. 89, 55 S. Ct. 678, 79 L. Ed. 1322 (1935); *El Bond & Share Co. v. Securities & Exchange Comm.,* 1937, 2 Cir., 92 F. (2d) 580, affirmed 303 U. S. 419, 58 S. Ct. 678, 82 L. Ed. 936, 115 A. L. R. 105. Argumentative allegations or inference from facts are insufficient. *Milliken v. Stone,* 1927, 16 F. (2d) 981, 984 (C. C. A. 2), cert. denied 274 U. S. 748, 47 S. Ct. 764, 71 L. Ed. 1331.

The reason for this rule is that factually unsupported generalities present no genuine issue of fact to be tested by the pleadings, and constitute a mere conclusion. *Agnew v. City of Compton,* 1957, 9 Cir., 239 F. (2d) 226; *McGuire v. Todd,* 1952, 5 Cir., 198 F. (2d) 60, *certiorari* denied, 344 U. S. 835, 73 S. Ct. 44, 97 L. Ed. 649, 650; *Yglesias v. Gulfstream Park Racing Ass'n.,* 1953, 5 Cir., 201 F. (2d) 817, *certiorari* denied, 345 U. S. 993, 73 S. Ct. 1132, 97 L. Ed. 1400; *Ortega v. Ragen,* 1954, 7 Cir., 216 F. (2d) 561, *certiorari* denied, 349 U. S. 940, 75 S. Ct. 786, 99 L. Ed. 1268; *Gibson v. Reynolds,* 1949, 8 Cir., 172 F. (2d) 95.

But even if the above allegations should be construed as being more than mere conclusions and generalities, the

defendant Horne, acting as Mayor, would still have a qualified privilege affording him a defense against civil liability for alleged harms done by him in good faith, in the performance of his official duties as he understood them. *Tenney v. Brandhove,* 1951, 341 U. S. 367, 71 S. Ct. 783, 94 L. Ed. 1019; *Yaselli v. Goff,* 1926, 2 Cir., 12 F. (2d) 396, 56 A. L. R. 1239; *Cobb v. City of Malden,* 1953, 1 Cir., 212 F. (2d) 701; *Hartline v. Clary,* 1956, E. D. S. C. 141 F. Supp. 151; *Papagianakis v. Samos,* 1950, 4 Cir., 186 F. (2d) 257, 260.

The last cited case, in a very able opinion by Chief Judge John J. Parker, discusses not only judicial immunity, but also the immunity of non-judicial officers as follows:

> "The rule as now declared in many cases has been applied, not only to officials judicial and *quasi*-judicial, but to executive officers generally, such as the Postmaster-General, the Secretary and Assistant Secretary of the Treasury, Members of the United States Parole Board, the Parole Executive, the Warden of a Federal penitentiary, the Director of the Bureau of Prisons, the Commissioners of the District of Columbia, the Chairman of the Tariff Commission, a building inspector, the United States Commissioner of Indian Affairs, and the Chief of Record and Pension Office of the War Department.
>
> The reason now given for the rule is simply one of public policy. 'Otherwise the perfect freedom which ought to exist in discharge of public duty might be seriously restrained, and often to the detriment of the public service.' *De Arnaud v. Ainsworth,* 24 App. D. C. 167, 178, 5 L. R. A., N. S. 163. See also United States, to Use *of Parravicino v. Brunswick,* 63 App. D. C. 65, 68, 69 F. 2d 383, 386. As was pertinently said in an English case; '* * * does an action lie against a man for maliciously doing his duty? I am of the opinion that it does not; * * *' *Dawkins v. Paulet,* L. R. 5 Q. B. 94, 114."

IMMUNITY OF PROSECUTING ATTORNEYS

The law is clear that state's attorneys and prosecuting attorneys are "*quasi*-judicial" officers who enjoy the same immunity from a civil action for damages as that which protects a judge acting within his jurisdiction over the parties and the subject matter of the litigation. See, *e. g.*, *Kenney v. Fox*, 232 F. (2d) 288 (6th Cir., 1956), cert. denied 352 U. S. 855, 77 S. Ct. 84, 1 L. Ed. (2d) 66 (affirming a dismissal of an action under 42 U. S. C. A. Sec. 1938 against a prosecuting attorney). And it has been held that where the allegations of the complaint show that the acts charged against an assistant state's attorney were performed in the discharge of his official function and duties, then "under the law as recognized in a long line of cases, such officials are immune to prosecution" of a civil rights suit. *Peckham v. Scanlon*, 241 F. (2d) 761, 763 (7th Cir., 1957); *Hartline v. Clary*, E. D. S. C. 1956, 141 F. Supp. 151; *Papagianakis v. Samos*, 4 Cir. 186 F. (2d) 257.

Further authority for the proposition that alleging that acts occurred when state's attorneys were acting in their official capacity means that no claim is stated is the case of *Jennings v. Nester*, 217 F. (2d) 153 (7th Cir., 1954). In *Stift v. Lynch*, 267 F. (2d) 237, 239 (7th Cir., 1959) the court approved the dismissal of a civil rights action against the State's Attorney and the Assistant State's Attorney, saying that "prosecuting officials are not to be amerced by actions under the Federal Civil Rights Act for their actions in connection with official prosecutions even though it is alleged that such acts were done maliciously."

The Court of Appeals for the Seventh Circuit, in *Cawley v. Warren*, 1954, 7th Cir., 216 F. (2d) 74, affirmed the dismissal of a complaint brought under the Civil Rights Act against a state prosecuting attorney, his first assistant, and the foreman of a state grand jury, accused of wrongfully procuring the indictment of the plaintiff in an Illinois

county, upon the ground that, as "judicial officers," they were protected by the same rule of immunity which is applicable to judges. *Bradley v. Fisher, supra; Francis v. Crafts, supra,* and *Laughlin v. Rosenman,* 1947, 82 U. S. App. D. C. 164, 163 F. (2d) 838, were cited as authorities.

Egan v. City of Aurora, 365 U. S. 514, 81 S. Ct. 684 (1961) cited *contra* by appellants, is authority only for the proposition that an action may be remanded for further consideration to an appellate court where that court does not specify the grounds for dismissing the complaint under 42 U. S. C. Sec. 1985, 42 U. S. C. A. Sec. 1985.

Here, of course, the District Judge spelled out his grounds for dismissing the action against the Town Attorney. See *Snowden v. Hughes,* 321 U. S. 1, 64 S. Ct. 397 (1944.)

CONCLUSION

The acts and rulings of which appellants complain were subject to review by a state appellate court which, if found to be illegal or prejudiciously erroneous, would invalidate the judgment of conviction. It is respectfully submitted that appellants' remedy is not to sue the municipal judge for $50,000.00 in damages. Under orderly procedures their proper remedy would be to appeal the conviction to a higher court.

For the reasons above stated, the judgment appealed from should therefore be affirmed.

Respectfully submitted,

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United States Court of

For the Fourth Circuit

No. 10,718

GENEVA TRACY, VICTORIA DELEE, ANNA WI
UTSEY, DIANNE GRANT, by her mother a
LAUREEN GRANT, EDNA DELEE, by her n
friend, CORA LEE DELEE, JAMES LEMON, by
next friend, BEATRICE LEMON; on their ow
behalf of all others similarly situated,

against

W. DUNCAN HORNE, individually and as M
of St. George; J. WILSON PATRICK, ind
Town Attorney for the Town of St. G
agents, successors, employees, subordinat

APPELLANTS' BRIEF AND A

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NA WILLIAM, OLLIE MAE
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her mother and next
MON, by his mother and
heir own behalf and on
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Appellants,

d as Mayor of the Town
K, individually and as
St. George; and their
rdinates and attorneys,

Appellees.

ND APPENDIX

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United States Court of Appeals

For the Fourth Circuit

No. 10,718

GENEVA TRACY, VICTORIA DELEE, ANNA WILLIAM, OLLIE MAE UTSEY, DIANNE GRANT, by her mother and next friend, LAUREEN GRANT, EDNA DELEE, by her mother and next friend, CORA LEE DELEE, JAMES LEMON, by his mother and next friend, BEATRICE LEMON; on their own behalf and on behalf of all others similarly situated,

Appellants,

against

W. DUNCAN HORNE, individually and as Mayor of the Town of St. George; J. WILSON PATRICK, individually and as Town Attorney for the Town of St. George; and their agents, successors, employees, subordinates and attorneys,

Appellees.

APPELLANTS' BRIEF

Statement of the Case

Procedural History

On September 27, 1965 plaintiffs filed their complaint seeking a temporary restraining order, preliminary and permanent injunctions, and a declaratory judgment against

all the defendants and damages from defendants Robbins and Horne. The suit was brought under 28 U. S. C. 1343, and 2201 alleging claims under 42 U. S. C. 1983 and 1985. That same day plaintiffs moved ex parte for a temporary restraining order, which order was denied by the District Court. On October 11, 1965 a hearing was held on the motion for a preliminary injunction with decision being reserved. Thereafter on October 22, 1965 defendants moved to dismiss the complaint for, among other things, failure to state a claim. On February 25, 1966 plaintiffs answered said motion. On April 14, 1966 the District Court issued a final order dismissing the complaint as to defendants Horne and Patrick. The opinion and order of the District Court is printed in the Appendix hereto. On May 12, 1966 a notice of appeal was filed naming only defendants Horne and Patrick as appellees, the order having been interlocutory in character as to defendant Robbins.

Chief of Police

Statement of Facts

Plaintiffs are all Negro citizens of the State of South Carolina. They sued individually and as representatives of a class, the Negro citizens of St. George. Defendant Horne was sued in his official capacity as Mayor of the Town of St. George, a person it was alleged in the complaint who was authorized and directed by law "to have superintending control of all the officers and affairs of the municipality and to take care that the laws and ordinances are executed" (App. 11a). Defendant Patrick was sued in his official capacity as Town Attorney of St. George, a person who was "the chief public official of the municipality

responsible for the prosecution of alleged violations" of ordinances and statutes (App. 11a).

Plaintiffs asserted three claims: (1) the St. George anti-picketing ordinance was unconstitutional on its face in that it abridged their First Amendment rights; (2) under color of state law the defendants had pursued a policy, practice, custom and usage forbidding and preventing the exercise of their First Amendment rights to picket, demonstrate and disseminate information; and (3) the defendants had conspired together to abridge the exercise of these First Amendment rights by plaintiffs.

Plaintiffs alleged that commencing on or about August 1, 1965 they engaged in picketing activities in the Town of St. George (App. 14a, Par. 8) and that they were either punished or intimidated by the defendants from pursuing these activities as a result of at least three incidents (App. 14a-16a, Pars. 9, 10, 11 and 13).

The District Court dismissed the complaint as to defendants Horne and Patrick for failure to state a claim because it did "not allege any matter which would except these defendants from the well settled immunity of judges and quasi-judicial officers from suit arising out of their conduct in the performance of their official duties. This doctrine also extends to conspiracy actions under 42 U. S. C. section 1985" (App. 4a-5a). The complaint was sustained as to defendant Robbins.

Questions Presented

1. Whether a complaint fails to state a claim for either injunctive relief or damages against a mayor when it is alleged (a) that the mayor has ultimate responsibility over law enforcement in a town; (b) that arrests, prosecution and punishment have resulted to those who exercise First Amendment rights of picketing and demonstrating; (c) that such local law enforcement was accomplished in concert with, among others, the police chief, on the ground that a mayor who also sits as a municipal court justice is immune from suit under 42 U. S. C. 1983 and 1985.

2. Whether a complaint fails to state a claim for injunctive relief against a town attorney when it is alleged (a) that he is the chief prosecutor in the township; (b) that arrests, prosecution and punishment have resulted to those who exercise First Amendment rights of picketing and demonstrating; (c) that such local law enforcement was accomplished in concert with, among others, the police chief, on the ground that a public prosecutor being a quasi-judicial officer is immune from suit under 42 U. S. C. 1983.

Statutes Involved

42 U. S. C. §1983 provides:

> "Every person who, under color of any statute, ordinance * * * of any State or Territory, subjects or causes to be subjected, any person * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U. S. C. §1985(3) provides:

"If two or more persons in any State or Territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

ARGUMENT

I

The District Court erred in holding that a mayor and town attorney who act under state law or custom knowingly to deprive persons of rights secured by the Constitution and laws of the United States are immune from liability, and injunctive relief under statutes that apply to all persons without exception, that were said by the Congress that enacted them to apply to judges and prosecutors and that were intended to create a remedy for sham justice in state courts.

The District Court held that the complaint stated a claim as to defendant Robbins, the Chief of Police (App. 5a). It dismissed as to defendants Horne, the Mayor, and Patrick, on the sole ground of "judicial" and "quasi-judicial" immunity under §1983 and 1985 (App. 4a-5a).

Legislative History of Judicial and Quasi-Judicial Immunity

It is apparent from the legislative history of 42 U. S. C. 1983 and 1985, 17 Stat. 13, Sections 1 and 2 of the Civil Rights Act of 1871, that Congress intended state court judges to be liable in damages if they acted under color of state law or custom knowingly to deprive a person of rights, privileges or immunities secured by the Constitution of the United States. This is not to say that a mere error of judgment or non-willful abuse of discretion would be actionable. Rather a willful and knowing "deprivation of any rights, privileges or immunities" is the basis of remedial action.

The statutes provide for no exceptions. Section 1 made "any" person who so deprives "any" person liable in damages.*

All the members of Congress who spoke on the problem explicitly stated that these sections applied to judges. None disagreed. See *Congressional Globe,* 42d Cong., 1st

* As altered by the revisor who prepared the Revised Statutes of 1878, Sec. 1 refers to "every" person who deprives "any" person of his rights. "Every is just as inclusive as "any", but as originally enacted the parallelism of "any" in describing culprit and victim makes it even clearer that Congress did not intend to provide for *sub silentio* immunity to judges.

The revisor removed other language that textually made it clearer that no immunity was intended. As enacted, the section stated that any person shall be liable for depriving persons of their constitutional rights, etc., under color of state law, custom, etc., "*any such law, statute, ordinance, regulation, custom or usage to the contrary notwithstanding*". (Emphasis supplied to the words that were removed.)

The revisor lacked authority to alter the law substantively. See Revised Statutes of the United States, 1878, Preface, p. 4; Appendix, pp. 1092-1093; 19 Stat. 268, ch. 82 §4 as amended by 20 Stat. 27, ch. 26. Title 42 has not been enacted into positive law.

Sess., 1871: Congressman Arthur, 3/31/71, p. 365, col. 3—p. 366, col. 1; Congressman Sheldon, 3/31/71, p. 368, col. 1; Congressman Lowe, 3/31/71, p. 376, col. 1; Congressman Lewis, 4/1/71, p. 385, col. 1. *Cf.* Senator Thurman, 4/13/71, p. 217, col. 1.

Congress was concerned not with protecting good men against having to face charges of wrongdoing but rather with defiance of law by mobs and officials including judges. Congress was concerned that "immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress."* It was shocked at the record of many judges.** It was, indeed, the breakdown of justice that gave rise to the need for legislation.

If it be said that it is harsh or unwise to subject the state judiciary to suits alleging that they knowingly acted to deprive a man of his civil rights, the simple answer is that Congress in 1871 intended harsh remedies to check bloody terror, stubborn defiance and abuse of legal process. A bloody civil war had been fought. Congress had ousted

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* Congressman Lowe, 3/31/71, p. 374, col. 3.

** See for example: Senator Sherman (summing up conference report) "Spreading terror and violence * * * now exist unchecked by punishment, independent of law, uncontrolled by magistrates." 4/19/71, p. 820, col. 2.

Congressman Rainey: "The courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity." 4/1/71, p. 394, col. 3.

Congressman Bentley: The remedy is needed because of "prejudiced juries and bribed judges." 4/3/71, p. 429, col. 2.

Senator Osborn: "These men with hands stained with blood, hostile to every man who stood by his country during the war, determined by fair means or by foul, that loyal men shall not remain in power, ought not to sit upon juries and administer the laws enacted to punish their own crimes." 4/13/71, p. 654, col. 2.

state governments altogether and put in military governments. And then after terror against and injustice to the newly freed blackmen and the loyalists spread, Congress enacted the Civil Rights Act of 1871. Other sections of that Act were potentially far harsher than applying Section 1 to judges. See, *e.g.,* Sections 3, 4 and 6.

The legislative history of Section 2 of the Civil Rights Act of 1866, 14 Stat. 27, also supports the conclusion that the 1871 Congress intended to cover the state judiciary. It does so because (1) the similar terms of the earlier Act were specifically referred to as a guide to the 1871 Act by its principal sponsor, Congressman Shellabarger, when he introduced the 1871 Act, *Cong. Globe,* 42d Cong., 1st Sess. 1871, 3/28/71, p. 319, col. 3, printed in Appendix, p. 68, col. 1 and (2) the temper of the earlier Congress casts light upon that of the later Congress. President Andrew Johnson vetoed the 1866 Act after it was first passed on the ground, among others, that it subjected state judges to criminal liability for depriving persons of their civil rights. *Cong. Globe,* 39th Cong., 1st Sess., 3/27/66, pp. 1679, 1680, col. 2. Congress re-enacted the Act over the President's veto and in so doing specifically stated that it was intended that judges who knowingly used their office to deprive persons of their civil rights should be punished.*

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* See Senator Trumbull, Chairman of the Committee on the Judiciary, who led the effort to overrule the veto, at *id.,* 4/4/66, pp. 1758-59, passim, and in particular:

> "But it is said that under this provision judges of the courts and ministerial officers who are engaged in the execution of any such statutes may be punished. * * * I admit that a ministerial official or a judge, if he acts corruptly or viciously or under color of an illegal act may be and ought to be punished. * * *"
>
> "The assumption that State judges and other officials are not to be held responsible for violations of United States laws,

Judicial Immunity

Picking v. *Pa. R. Co.*, 151 F. 2d 240, 251 (3d Cir. 1945), is the only decision dealing with the question of judicial immunity under Sections 1983 and 1985 to consider any part of this legislative material. In *Picking,* the Third Circuit held there was no such immunity. *Cf., McShane* v. *Moldovan,* 172 F. 2d 1016 (6th Cir. 1949). Other Circuits have held that judges are immune under the Act, due to the Supreme Court's holding in *Tenny* v. *Brandhove,* 341 U. S. 367 (1951), holding that State legislators were immune under §1983. See, *e.g., Kenney* v. *Fox,* 232 F. 2d 288 (6th Cir. 1956); *Haldane* v. *Chagnon,* 345 F. 2d 601 (9th Cir. 1965). This is a misapplication of the holding in *Tenny* v. *Brandhove, supra,* for Congress intended to cover judges, but not legislators. The statute on its face covers those who act under color of law, not those who enact laws. This distinction was made explicit during the debate on the provisions of section 2 of the Civil Rights Act of 1866. See *Cong. Globe,* 39th Cong., 1st Sess. p. 1758 (Senator Trumbull, floor leader of the bill).

The cases cited by the Court below to support its holding of judicial immunity are inapposite. (App. 4a, n.5)

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when done under color of State statutes or customs, is akin to the maxim of the English law that the King can do no wrong. It places officials above the law. It is the very doctrine out of which the rebellion was hatched."

See also Senator Johnson, *id.,* 4/5/66, p. 1778, col. 1; Senator Cowan, 4/5/66, p. 1783.

Congressman Lawrence, the only speaker on the subject in the House, said:

"* * * it is better to invade the judicial power of the State than permit it to invade, strike down, and destroy civil rights of citizens. * * *" *Id.,* 4/7/66, p. 1837, col. 1.

Haldane v. *Chagnon, supra,* relied on *Tenny* v. *Brandhove, supra.* The remainder were *Rhodes* v. *Meyer,* 334 F. 2d 709 (8th Cir. 1964), *cert. denied,* 379 U. S. 915 (1964) (Plaintiff sued a judge who had cited him for contempt); *Agnew* v. *Moody,* 330 F. 2d 868 (9th Cir. 1964), *cert. denied,* 379 U. S. 867 (1964) (Plaintiff sued a judge for his having been convicted for a speeding offense); and *Rhodes* v. *Houston,* 202 F. Supp. 624 (D. C. Neb. 1962), *aff'd per curiam,* 309 F. 2d 959 (8th Cir. 1962), *cert. denied,* 372 U. S. 909 (1963) (Plaintiff sued a judge who had cited him for contempt). In none of these cases was there a claim of deprivation of First Amendment rights by Negro citizens, such as there is herein. Additionally, none of these decisions referred in the slightest to the legislative history of 1983 and 1985.

The allegation of use of judicial process to convict plaintiff William as set forth in Paragraph 9 of the Complaint (App. 14a) (all of which must be taken as true on the motion to dismiss), is the precise type of state activity which the Congress that enacted these statutes sought to provide relief against. Judicial engraftment of a doctrine of "judicial immunity" onto statutes which by their terms are all inclusive and which were intended to establish judicial liability constitutes a violation of statutory purpose as well as an unwitting aid to the further abridgment of federal rights.

Quasi-Judicial Immunity

Defendant Patrick, the Town Attorney, was not sued for damages, but merely for injunctive and declaratory relief. (App. 17a-19a). The District Court, in holding Patrick immune from suit on grounds of a "quasi-judicial"

immunity creates an unwarranted judicial gloss on 1983, a gloss which is directly at odds with the law as enunciated by the Supreme Court.

In *Egan* v. *City of Aurora,* 365 U. S. 514 (1961), *rev'g* 275 F. 2d 377, in a *per curiam* opinion the Court reversed the Seventh Circuit which had relied on *Tenny* v. *Brandhove, supra,* and reinstated the complaint against a prosecutor. *Lewis* v. *Brautigam,* 227 F. 2d 124 (5th Cir. 1955); *Johnson* v. *Crumlish,* 224 F. Supp. 22 (E. D. Pa. 1963). In fact, in numerous other cases not only have complaints been sustained, but injunctive relief has been granted against prosecuting officials under these statutes. *E.g., Dombrowski* v. *Pfister,* 380 U. S. 479 (1965) (State Attorney General).

Barr v. *Matteo,* 360 U. S. 564 (1959), the case principally relied upon by the District Court (App. 4a, n.5), involved a a libel claim based on a press release issued by the acting director of a federal agency. It did not involve a state prosecutor; it did not involve a claim for solely injunctive relief; it did not in any way touch upon, deal with or otherwise refer to 1983; and in no way was the Court in *Barr* balancing the need for governmental efficiency against a plaintiff's assertion of deprivation of constitutional right. Whatever validity *Barr* might have had on this issue, it must be deemed to have been qualified by *Egan* v. *City of Aurora, supra,* because not only is *Egan* directly in point, but also because it was decided subsequent to *Barr.* The remaining authorities cited by the District Court in support of its holding cannot be considered to be persuasive, given the controlling authority of *Egan.*

The Supreme Court's holding in *Egan,* the express and all inclusive scope of the statute, the clear intent of the 1871 Congress, and the lack of any persuasive authority to support the District Court's holding of "quasi-judicial immunity" under 1983, requires the reinstitution of the complaint as against the defendant Patrick.

Non-Judicial Immunity

Plaintiffs' allegation in the complaint that the Mayor, defendant Horne, has supervisory control over all the officers and affairs of the municipality (Par. 4, App. 11a) must be taken as true on a motion to dismiss the complaint. Such control necessarily alleges control and responsibility for all of the actions of the defendant Robbins, the Chief of Police. The District Court found the complaint stated a valid claim against the defendant Robbins; it necessarily follows the complaint is valid against the defendant Horne.

As the chief executive officer of the municipality defendant Horne is the most appropriate officer to effectuate the declaratory and injunctive relief prayed for. The District Court's dismissal of the complaint against defendant Horne on grounds of "judicial immunity" overlooks and disregards the close nexus which exists between Horne's "judicial" activities as a Municipal Court Judge and his activities and responsibilities for overall law enforcement in the community. In no event however can "judicial immunity" be said to extend an immunity for non-judicial activities. Indeed, by its dismissal of the complaint, the District Court has *sub silentio* established a wide and novel area of non-judicial immunity for chief executive officers of State municipalities, an area which is not only unsupported by

reference to the express and all inclusive terms of 1983 and 1985, but is also unsupported by the decisions.

The District Court's *sub silentio* holding of Mayoral immunity disregards the law as enunciated by the Supreme Court, as well as this Court's own ruling. *Hague* v. *C. I. O.*, 307 U. S. 496 (1939); *Dawson* v. *Mayor and City Council*, 220 F. 2d 386 (4th Cir. 1955); *Sawyer* v. *City of Mobile*, 208 F. Supp. 548 (S. D. Ala. 1961); *Draper* v. *City of St. Louis*, 92 F. Supp. 546 (E. D. Miss. 1950); *cf.*, *Anderson* v. *City of Albany et al*, 321 F. 2d 649 (5th Cir. 1963).

The purpose of 1983 and 1985 was to provide litigants with an avenue of relief from the deprivation of federal rights by state officers. When a judicially declared doctrine of immunity excludes judges, quasi-judicial officers and executive officers, then these statutes have, in effect, been repealed. Plaintiffs respectfully submit that the repeal of federal statutes is a Congressional function and not a judicial one, and should not, therefore, be condoned by this Court.

Conclusion

For the foregoing reasons the judgment of the District Court in dismissing the complaint against defendants Horne and Patrick should be reversed.

Respectfully submitted,

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Attorneys for Appellants

APPENDIX

Order and Opinion of Hemphill, D. J., April 13 1965

Defendants here move for dismissal of the complaint on grounds that the complaint fails to state sufficient grounds upon which relief can be granted, and further that the complaint does not state all causes of action separately, does not present a clear and concise statement of the facts relied upon, and that the verification does not meet the standards required by the Federal Rules of Civil Procedure.

Alternatively, defendants move to strike certain allegations of the complaint on various asserted grounds.

Plaintiffs filed complaint in 1965 naming as defendants Jack W. Robbins, "individually and in his official capacity as Chief of Police" of the Town of St. George; W. Duncan Horne, "individually and in his official capacity as Mayor"; and J. Wilson Patrick, "individually and in his official capacity as Town Attorney." Jurisdiction of the court was invoked under 42 U. S. C. sections 1981, 1983, 1985, and 1988 and 28 U. S. C. sections 1343, 2201 and 2202.

Paragraph three of the complaint avers that plaintiffs are citizens of the United States, Dorchester County, South Carolina, and, some, of the Town of St. George, who are "actively engaged in lawful and peaceful activities aimed at securing to members of the Negro race * * * the full enjoyment of rights granted by the Constitution and laws of the United States," and that they sue "individually and on behalf of all other residents of St. George who have been similarly engaged in civil rights activities * * * pursuant to Rule 23(a)(3) because there are common questions

of law and fact affecting all members of the class, and because *common relief is sought.*" [Emphasis added.]

Plaintiffs submit the complaint is directed only to alleged deprivations by the defendant officers of the Town of St. George of the plaintiffs' rights of free speech, petition, and assembly secured to them as citizens by the First and Fourteenth Amendments of the Constitution of the United States.

From the profusion and editorial confusion of factual allegations the propriety of which will be faced later it is discernible that the infringement of constitutional rights is alleged to have occurred during a Congress-of-Racial-Equality sponsored picketing demonstration on the streets of St. George during which the defendant officials were responsible for certain alleged actions and arrests made to the end of enforcing a municipal ordinance controlling picketing and demonstrating in the town. Four of the plaintiffs were arrested for violations of the ordinance. Two cases were dismissed; the other two resulted in conviction and fine in the municipal court over which the defendant Horne presided as judge.

Plaintiffs allege that unless the court declares the picketing ordinance unconstitutional and enjoins its enforcement that their constitutional rights will continue to be denied.

The prayer consists of ten specific requests for relief including preliminary injunction, temporary restraining order, permanent injunction, with measures for continuing enforcement of such orders on defendants' successors, and an ad damnum for damages resulting from the alleged un-

lawful acts of defendants Robbins and Horne in the amount of $50,000 each. Mindful of the wide latitude and liberality to be afforded pleading under the Federal Rules of Civil Procedure, this court must, in considering defendants' motions, weigh carefully the severity of consequences in granting the motion to dismiss. In ruling on motion to dismiss the pleading must be construed in a manner most favorable to the party against whom the motion is made,[1] and unless there is no doubt as to the result the case should be disposed of upon hearing on the merits.[2]

Defendants submit by motion that the complaint is defective in its verification. It is signed by the attorney purportedly "on behalf of the plaintiffs because the * * * complaint deals chiefly with matters of law and legal inference from facts alleged and/or of which I as an attorney have more knowledge than the plaintiff" and attests that the contents of the complaint are true to his "own personal knowledge" or are "supported by signed statements or are stated on information and belief." The objection made is that the basis given for his signature falls short of the requirement that an attorney's signature be equivalent to a certificate of merit and good faith. Rule 11 of the Federal Rules of Civil Procedure provides that "[e]xcept when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit." Further, that the attorney's certificate need only be based on the "best of his knowledge, information,

1. Walker Distributing Co. v. Lucky Lager Brewing Co., 323 F.2d 1 (9th Cir. 1963).

2. Conley v. Gibson, 355 U. S. 41 (1957); Sidebotham v. Robison, 216 F.2d 816 (9th Cir. 1954).

and belief there is good ground to support it." Rule 65(b) provides in effect that no temporary restraining order shall be granted without notice unless immediate and irreparable injury, loss or damage be clearly shown from facts set forth by affidavit or by verified complaint. If the verification, or the discrepancies or errors therein, are the result of ignorance, they will not be charged against plaintiffs who had to depend on whatever counsel they could get.

The lack of verification or a defective verification should not be, and is not, fatal to the complaint merely because a temporary restraining order is sought in conjunction with other forms of relief. No temporary restraining order having been issued here, and actual notice of motion having been received, the application for such order is subject to no further special procedural requirements.[3]

There appears no doubt, however, that the complaint insofar as it applies to defendants Horne and Patrick does not allege any matter which would except these defendants from the well settled immunity of judges[4] and quasi-judicial officers[5] from suit arising out of their conduct in

3. See 3 Barron & Holtzoff, Federal Practice & Procedure §1432 (Wright's ed. 1958).

4. *E.g.,* Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965); Rhodes v. Meyer, 334 F.2d 709 (8th Cir. 1964) *cert. denied* 379 U. S. 915 (1964); Agnew v. Moody, 330 F.2d 868 (9th Cir. 1964) *cert. denied* 379 U. S. 867 (1964); Rhodes v. Houston, 202 F.Supp. 624 (D. C. Neb. 1962) *aff'd* per curiam, 309 F.2d 959 (8th Cir. 1962), *cert. denied* 372 U. S. 909 (1963).

5. Barr v. Matteo, 360 U. S. 554 (1959). See cases cited note 4 *supra.*

the performance of their official duties. This doctrine also extends to conspiracy actions under 42 U. S. C. section 1985.[6]

Inasmuch as the complaint sues defendant Horne in his official capacity, alleging acts performed by him as the presiding judge of the municipal court,[7] and defendant Patrick in his official capacity as Town Attorney, alleging acts performed by him in discharge of his official duties,[8] the complaint must be dismissed as to these defendants on the grounds that no claim has been stated upon which relief can be granted.

Judicial immunity does not, however, extend to law enforcement officers[9] except perhaps in the narrow area of activity where they are only performing orders issued by the court.[10] The motion to dismiss therefore cannot be granted on this ground as to defendant Robbins.

The remaining grounds on which the motion to dismiss is based are that the complaint does not separately state the causes of action, and does not contain a short, clear, and concise statement of the claim. Federal Rule of Civil Procedure 10(b) states that "[e]ach claim founded upon a separate transaction or occurrence * * * shall be stated in a separate count * * * whenever a separation facilitates the clear presentation of the matters set forth."

6. See Agnew v. Moody, 330 F.2d 868 (9th Cir. 1964) *cert. denied* 379 U. S. 867 (1964) and cases cited therein.

7. Paragraph 9 of the Complaint.

8. Paragraphs 4 and 9 of the Complaint.

9. Monroe v. Pope, 365 U. S. 167 (1961).

10. See Rhodes v. Houston, 202 F.Supp. 624, 636 (D. C. Neb. 1962) and cases cited therein.

Plaintiffs submit by anwser to defendants' motion that there is but one cause of action here pursued, and at hearing on the motion plaintiff's counsel responded:

> The Court: What is your cause of action?
>
> Mr. diSuvero: Our cause of action is that by the passage of the ordinance which is described in Exhibit A and by the several acts which have been conducted against the picketers in the Town of St. George plaintiffs and a class that they represent have been denied their 1st and 14th Amendments rights to free speech and to free assembly. And it is that cause of action which we assert, and none other.

The court is constrained to find that if that be the intention of plaintiff the complaint fails of the requirement that a claim shall be set forth in "a short and plain statement,"[11] and that each averment shall be "simple, concise and direct."[12]

Jurisdiction of the court was invoked under 42 U. S. C. §§1983 and 1985 among others. Section 1983 is entitled *Civil Action for deprivation of rights.* Section 1985 is entitled *Conspiracy to interfere with civil rights—Preventing officer from performing duties.* Certainly if plaintiffs are pleading conspiracy, and it is in no other way evident, such would constitute a separate cause of action from a claim of deprivation of rights under color of law under section 1983. The complaint at best, has the appearance of a groping after a plausible excuse for according preferential treatment to some class.

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11. Fed. R. Civ. Pro. 8(a).

12. Fed. R. Civ. Pro. 8(c). See Barron & Holtzoff, Federal Practice and Procedure §255 (1960).

Plaintiffs have further appended to their claims for equitable relief a claim for damages against the (remaining) defendant Robbins. The complaint does not reveal what general damages were sustained as a result of defendant's acts nor does it allege special damages, which must be pleaded.[13] In a claim for the violation of constitutionally guaranteed rights damages are recoverable,[14] nominal damages may be presumed,[15] and such may in appropriate circumstances support an award of exemplary damages.[16]

However, plaintiffs here by their plea sue as a class "because of common questions of law and fact," and seek "common relief."[17] This type of action so far as it seeks damages in tort would properly be characterized as "spurious."[18] While there may be common questions of law

13. Fed. R. Civ. Pro. 9(g); 25 C. J. S. *Damages* §131 (c) (1966).

14. *E.g.*, Flemming v. South Carolina Elec. & Gas Co., 224 F.2d 752 (4th Cir. 1955) *appeal dismissed* 351 U. S. 901 (1956).

15. Basista v. Weir, 340 F.2d 74 (3rd Cir. 1965).

16. *Id.* at 87.

17. "Common relief" under Rule 23(a)(3) is interpreted at 3 Moore's Federal Practice §23.10 (3) [6] as meaning that "all members of the class must seek or be entitled to the same kind of relief, *i.e.*, injunctive relief, damages * * *; one member of the class could not seek damages, another specific performance, another injunctive relief." "Common relief" means "emanating from the same original source, either by way of grant, contract, tort, or statute where the claims for beneficiaries flow from the same fountain but are allowed not in a joint judgment but in several judgments." Kainz v. Anheuser-Busch, Inc., 194 F.2d 737, 743 (7th Cir. 1952) *cert. denied* 344 U. S. 820 (1952). See also cases cited note 19 infra.

18. Jinks v. Hodge, 11 F. R. D. 346 (E. D. Tenn. 1951). See 3 Moore's Federal Practice §23.03 n. 9 and §23.10(3) (2nd ed. 1964); 2 Barron & Holtzoff, Federal Practice & Procedures §562.3 (Wright ed. 1961).

and fact involved, the rights of members of the class are several and the action is but an invitation for all similarly situated, on whose behalf the suit is brought, to come in to enforce and protect those individual rights.[19]

The rights being distinct and several each party must show the injury which entitles him to damages, and the extent of the damages to which he is entitled. See *Jinks* v. *Hodge,* 11 F. R. D. 346 (E. D. Tenn. 1951).

The fact that counsel may have attempted to present these claims under a misconceived legal theory does not work a forfeiture of these rights. The broad purpose of the adoption of the Federal Rules was well expressed in *New Amsterdam Cas. Co.* v. *Waller,* 323 F.2d 20 (4th Cir. 1963).

> They were designed for the protection of the diligent litigant who has a just cause, but who, during some stage of the proceedings, misconceived the nature of his cause or mistook his remedy. In this day, a party ought not and does not lose his right when his counsel, however formally, advances an erroneous legal theory. At 25.

If a just cause exists in fact, fair opportunity for presenting them to the court should not be lost.

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19. See *e.g.,* Hurd v. Illinois Bell Tel. Co., 136 F.Supp. 125 (N. D. Ill. 1955) *aff'd* 234 F.2d 942 (7th Cir. 1956) *cert. denied* Seybold v. Western Elec. Co., 352 U. S. 918 (1956) *reh. denied* 352 U. S. 977 (1957); Kainz v. Anheuser-Busch, Inc., 194 F.2d 737 (7th Cir. 1952) *cert. denied,* 344 U. S. 820 (1952); McGrath v. Todoyasu Abo, 186 F.2d 766 (9th Cir. 1951) *cert. denied* 342 U. S. 832 (1951); Oppenheimer v. F. J. Young & Co., 144 F.2d 387, 390 (2nd Cir. 1944); Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941); P. W. Husserl, Inc. v. Newman, 25 F. R. D. 264 (S. C. N. Y. 1960); Athas v. Day, 186 F.Supp. 385 (D. C. Colo. 1960), 161 F.Supp. 916 (D. C. Colo. 1958); Jinks v. Hodge, 11 F. R. D. 346 (E. D. Tenn. 1951).

There are allegations pertaining to certain individuals who are party to the suit which *may, if properly plead and proved,* entitle those interests to vindication by way of damages, depending upon the findings of the court or jury.

The court has wide powers of discretion under the liberal philosophy of pleading under the Federal Rules. When the interest of justice so requires the court may grant leave to amend the complaint.[20] The interests of justice would be so served in this instance.

Therefore defendants' motion to dismiss is granted as to defendants Horne and Patrick for as to them no claim has been stated upon which relief can be granted. Defendants' motion to dismiss on the grounds that the complaint fails to state separately the causes of action is also granted to be effective only at the expiration of twenty days from the date of this Order during which time this court expressly retains jurisdiction and grants leave to plaintiffs within that period to amend the complaint to conform to the rules and form of pleading. Plaintiffs may pursue, within the time allowed, their individual or collective request for injunction, if they be so advised. Every means will be exhausted to give them, and each of them, their "day in court". At such time defendants may then respond by motions appropriate and well found in the amended complaint.

And It Is So Ordered.

Robert W. Hemphill

Robert W. Hemphill
United States District Judge

Anderson, South Carolina
April 13, 1966.

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20. Fed. R. Civ. Pro. 15(a).

Complaint

Statement as to Jurisdiction

1. This is a civil action brought by the plaintiffs individually and on behalf of all those similarly situated for a temporary restraining order, a preliminary injunction, a permanent injunction and other equitable relief, to enjoin the deprivation under color of law of plaintiffs' rights, privileges and immunities secured to the plaintiffs by the Constitution of the United States as hereinafter more fully set forth. The suit also seeks a judgment declaring void and unconstitutional an ordinance of the Town of St. George, South Carolina ("St. George"), which deprives the plaintiffs of their constitutional rights.

Damages

2. Jurisdiction is conferred on this Court pursuant to Title 42 U. S. C. Secs. 1981, 1983, 1985, 1988 and Title 28 U. S. C. Secs. 1343, 2201 and 2202.

3. Plaintiffs Geneva Tracy, Victoria De Lee, Anna William, Ollie Mae Utsey, Dianne Grant, Edna De Lee and James Lemon are Negro citizens of the United States and of the County of Dorchester, State of South Carolina. Plaintiffs Tracy and Utsey are residents of St. George. All plaintiffs are actively engaged in lawful and peaceful activities aimed at securing to members of the Negro race who are residents of the State of South Carolina, of the County of Dorchester and of St. George, the full enjoyment of rights granted by the Constitution and laws of the United States. They sue individually and on behalf of all other residents of St. George who have been simi-

larly engaged in civil rights activities, which class is too numerous to bring before the court. Plaintiffs bring this action pursuant to Rule 23(a)(3) because there are common questions of law and fact affecting all members of the class, and because common relief is sought. The interest of said class is adequately represented by plaintiffs.

4. Defendant Jack W. Robbins is the Chief of Police of St. George, and as such is the chief public official of the municipality responsible for the preservation of the peace and public safety of St. George and the enforcement of the ordinances of St. George and the statutes of the State of South Carolina. He is sued herein individually and in his official capacity as Chief of Police. Defendant W. Duncan Horne is the Mayor of St. George and is authorized, empowered and directed by and under the statutes of the State of South Carolina to have superintending control of all the officers and affairs of the municipality and to take care that the laws and ordinances thereof are executed. He is sued individually and in his official capacity as Mayor. Defendant J. Wilson Patrick is the Town Attorney of St. George, and as such is the chief public official of the municipality responsible for the prosecution of alleged violations of the ordinances thereof and for the prosecution of alleged violations of statutes of the State of South Carolina. He is sued herein individually and in his official capacity as Town Attorney.

Claim for Relief

5. Plaintiffs and the members of the class which they represent have been and are engaged in activities in the State of South Carolina and in St. George which seek to obtain equal employment opportunities for Negroes, to assure to Negroes the right to avail themselves of public facilities and accommodations subject to the Civil Rights Act of 1964, to obtain equal voting rights for Negro citizens and generally to secure due process of law and equal protection of the laws to Negroes who are and have been deprived of these rights. In protest of the existence of discrimination, segregation and the denial of constitutional rights to the Negro citizens of St. George, plaintiffs have engaged or assisted in peaceful demonstrations, have distributed leaflets publicizing protests and boycotts, held meetings for the expression of such protests, and have peacefully picketed in an orderly fashion on the several sidewalks of St. George, all in the exercise of their rights of free speech, petition and assembly secured by Amendments I and XIV of the United States Constitution.

6. An ordinance of St. George (the "picketing ordinance") prohibits demonstrations and picketing "in any manner" which interferes with pedestrians or which blocks or interferes "in any manner" with the entrances or exits of stores or businesses; it further provides that any person "in charge" of picketing or demonstrations or who may be "engaged in placing, managing or in anywise controlling" picketing or demonstrations must be more than

three hundred feet from the pickets or demonstration. The picketing ordinance is entitled:

> AN ORDINANCE TO PREVENT UNLAWFUL PICKETING OR DEMONSTRATIONS IN THE TOWN OF ST. GEORGE, S. C.; AND THE DIRECTION, MANAGEMENT OR CONTROL OF PICKETS OR DEMONSTRATIONS IN SAID TOWN; AND TO PROVIDE PENALTIES FOR VIOLATION.

A copy of said ordinance is attached as Exhibit A.

7. Said picketing ordinance is void and unconstitutional on its face in that it is excessively vague and uncertain and in that it is overbroad, sweeping within its ambit constitutionally protected rights of free speech and liberty of movement, all of which denies to plaintiffs the freedom of speech and assembly and due process of law to which they are entitled under the First and Fourteenth Amendments of the United States Constitution. The ordinance emasculates the preferred position enjoyed by First Amendment rights by making *any* interference with pedestrians unlawful and also making *any* interference with traffic to entrances of businesses unlawful. The "300 foot" provision has no legitimate police purpose, violates the right of leaders to associate with, or assemble with their followers and curtails their liberty of movement. Said provision makes criminal activity which is connected to admittedly lawful picketing under the ordinance itself. The terms "demonstrate", "interferes with", "block", "in charge of", "engaged in directing, placing, managing or in anywise controlling" are all vague and indefinite.

In the area of First Amendment freedoms any restrictions upon such rights, if they are to be upheld at all, must be narrowly and specifically drawn. The wide and vague sweep of the picketing ordinance is exactly what the Constitutional guarantees condemn.

8. Commencing on or about Aug. 1, 1965 and on various days thereafter, plaintiffs or those associated with them have peacefully picketed in small single line formations and in a silent fashion in front of several stores in St. George.

9. On Aug. 20, 1965 Evonne Williams, a seventeen year old Negro, while picketing in front of the Piggily Wiggily store, was charged with violating the predecessor picketing ordinance. A copy of said ordinance is attached hereto as Exhibit B. Defendant Williams was charged with blocking and interfering with traffic at the entrance of said store. She appeared in Municipal Court on Aug. 30, 1965 and although she is indigent, no examination was made of her means, and no offer to appoint counsel was made by the presiding officer, the defendant W. Duncan Horne, herein. The City's case showed the defendant did not move quickly enough out of the way of a truck which eventually parked perpendicular across the sidewalk of Gavin St., in front of the aforesaid store in front of which the picket line was being conducted. Appearing *pro se* the defendant was found guilty and fined $25. The Town of St. George was represented by a prosecuting attorney. Subsequently the School Board of Dorchester County refused to transfer the defendant from an all Negro school to an all white school on account of her conviction.

10. On Sept. 18, 1965 Van H. De Lee, while marching on the picket line was arrested for simple assault and battery. The case was removed from the Magistrate's Court of Dorchester County to this Court on Sept. 24, 1965. (U. S. D. C. E. D. So. C. Criminal Action No. 24,427). The Petition therein fully develops the extent to which the petitioner's First and Fourteenth Amendments rights were violated.

11. On Sept. 25, 1965 at about 9:40 a.m. plaintiffs Victoria De Lee, Anna William, Dianne Grant, and Edna De Lee, while seated in a car owned by the Congress of Racial Equality ("CORE"), an organization dedicated to the advancement of equal rights for all races, were arrested by defendant Jack W. Robbins. The car was lawfully parked in a parking meter zone. The arrest warrant charges the defendants with violation of the picketing ordinance in that they are said to have been engaged in supervising the activity of the picket line which was less than 300 feet away. The defendants Victoria De Lee and Anna William had not conversed with any of the four picketeers from the inception of the picketing that morning. The defendants Dianne Grant, age 15 and Edna De Lee, age 14 have never acted in a supervisory capacity in connection with any picketing activity; indeed they have never been on the picket line.

12. Plaintiffs and others of the class they represent desire to engage in further picketing and demonstrations in Saint George to protest the failure of the city officials of St. George to respond in any way to their legitimate

demands or to insure their enjoyment of all the privileges and rights of citizens of the United States and of the State of South Carolina without discrimination on the ground of race or color.

13. Plaintiffs are prevented from engaging in picketing or demonstrating by the risk of further arrests, prosecution and incarceration under the picketing ordinance (Exhibit A). The practice of the police of St. George of arresting and incarcerating violators of said unconstitutional ordinance deters plaintiffs from picketing and demonstrating and therefore, effectively denies to them the exercise of their constitutional rights as protected by the First and Fourteenth Amendments to the United States Constitution.

14. Unless the picketing ordinance is declared unconstitutional by this Court and the defendants enjoined from enforcing it, plaintiffs will continue to be denied said constitutional rights and plaintiffs will be unable to vindicate said rights without subjecting themselves to arrest, prosecution and incarceration.

15. This suit involves a genuine case or controversy because the picketing ordinance deters the lawful and peaceful activities that the plaintiffs and the class which they represent have already undertaken and desire to undertake as hereinabove set forth.

16. Plaintiffs have no adequate remedy at law and will suffer irreparable injury unless a temporary restraining

order, a preliminary injunction and a permanent injunction are granted.

Prayer for Relief

17. WHEREFORE, plaintiffs respectfully pray:

(a) That defendants be permanently enjoined from enforcing and effectuating the picketing ordinance (Exhibit A) and from making arrests, prosecuting or incarcerating persons or taking any other action pursuant to said ordinance.

(b) That a temporary restraining order and a preliminary injunction be granted to plaintiffs enjoining defendants, and each of them, and those acting in concert or pursuant to their orders, from arresting, prosecuting, or incarcerating plaintiffs and members of the class which they represent, and from taking any other action pursuant to the above-mentioned picketing ordinance until the termination of this litigation.

(c) That said relief extend to any amended or substitute ordinance imposing a subsequent punishment on the constitutionally protected activity of peacefully assembling, picketing and demonstrating for the communication of political expression or belief.

(d) That the defendants be ordered to provide plaintiffs and the class which they represent with adequate police protection from violence, intimidation and harassment while peacefully assembling, picketing or demonstrating on the public streets and sidewalks of St. George so

that they can exercise their constitutional rights to free speech, and assembly and to petition for the redress of grievances as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

(e) That the defendants be served with a copy of this Court's judgment and that they be ordered to distribute copies of any temporary restraining or preliminary injunction or permanent injunction order granted herein to all of their subordinates (including deputies, police officers, investigators and other law enforcement personnel) together with a directive ordering compliance, and ordering that they on their own initiative take prompt steps to discipline any subordinate whom they may find to have violated the terms of the Court order.

(f) That this Court retain jurisdiction of this case for the purpose of enforcing any temporary restraining or injunctive order issued herein and for such other orders and proceedings as may become necessary in connection herewith.

(g) That any restraining or injunctive order issued by this Court be binding on the defendants and their agents, servants, employees, attorneys, successors in office, and all persons in active concert and participation with them who receive notice of the order.

(h) That the defendants be restrained from committing any act of violence or threatened violence against plaintiffs or any person for the purpose of preventing or discouraging such person or any other person from pick-

eting, assembling or demonstrating or exercising other fundamental personal rights, or advocating equal civil rights for Negroes, or assisting or encouraging others to do the same.

(i) That judgment be entered against the defendants individually and in their official capacities for damages inflicted upon plaintiffs as a result of defendants' unlawful acts in the following amounts:

1. Jack W. Robbins—$50,000.
2. W. Duncan Horne—$50,000.

(j) Plaintiffs further pray that they be accorded, their costs, including reasonable attorneys' fees, as well as such other and further relief as may appear to the Court to be equitable and just.

Respectfully submitted,

Henry M. di Suvero
c/o Mr. Willie C. Tracy
107 Franklin Ave.
St. George, S. C.

Of Counsel

Russell Brown
39 Spring St.
Charleston, S. C.
723-4573

Verification

State of South Carolina)
County of Charleston) ss.:

I, Henry M. di Suvero, of lawful age, first being duly sworn upon oath, depose and say:

That I am a member of the bar of the State of New York and of the State of California, and of the Southern District and of the Eastern District of the United States District Court of New York, and of the United States District Court for the Eastern District of South Carolina;

That I am the duly authorized attorney for plaintiffs herein authorized to prepare and verify the annexed complaint;

That I have read the annexed complaint and know the contents thereof;

That I know of my personal knowledge that all the facts stated therein are true or supported by signed statements or are stated on information and belief;

That as to subject matter I believe the complaint to be true and

That I sign the verification on behalf of the plaintiffs, because the annexed complaint deals chiefly with matters of law and legal inference to be drawn from facts alleged and/or of which I as an attorney have more knowledge than the plaintiffs.

Henry M. di Suvero

Subscribed and sworn to before me
this 27 day of September, 1965

Russell Brown, Notary Public

Exhibit A

An Ordinance to Prevent Unlawful Picketing or Demonstrations in the Town of St. George, South Carolina; and the Direction, Management or Control of Pickets or Demonstrators in Said Town; and to Provide Penalties for Violation

Be it ordained by the Town Council of the Town of St. George, South Carolina:

Section 1. It shall be unlawful for any person or persons to picket or demonstrate in any manner which interferes with the lawful rights of pedestrians or persons lawfully upon or using the sidewalks and/or streets of the Town of St. George, S. C.; or to block, or interfere in any manner with, the entrances to or exits from stores, or other places of business or any property of any person or persons; or to fail or refuse to obey the lawful order or command of any policeman or law enforcement officer.

Section 2. It shall be unlawful for any person or persons in charge of picketing or demonstrations, or any person or persons who may be engaged in directing, placing, managing, or in anywise controlling pickets or demonstrators, picketing or demonstrations, in the Town of St. George, S. C., to be stationed within the same block where such demonstrations may be taking place or carried on; and in no event shall such person or persons be stationed or located nearer than a distance of three hundred (300) feet from the store, business or building where such pickets or demonstrators may be stationed.

Section 3. Any person violating any of the provisions of this Ordinance shall be deemed guilty of a misdemeanor

and upon conviction thereof shall be subject to a fine of not less than ($10.00) ten dollars, nor more than one hundred ($100.00) dollars or imprisonment for not less than ten (10) days, nor more than thirty (30) days.

Section 4. All Ordinances or parts of Ordinances inconsistent herewith are hereby repealed.

Passed in Council this thirteenth day of
September, A.D. 1965

Exhibit B

An Ordinance to Prevent Unlawful Picketing in the Town of St. George, S. C.; and to Provide Penalties for Violations.

BE IT ORDAINED by the Town Council of the Town of St. George, South Carolina:

1. It shall be unlawful for any person or persons to picket or to demonstrate in any manner which interferes with the lawful rights of pedestrians or persons lawfully upon or using the sidewalks and/or streets of the Town of St. George, S. C.; or to block, or interfere in any manner with, the entrance to or exits from stores, or other places of business, or any property of any person or persons; or to fail or refuse to obey the lawful order or command of any policeman or law enforcement officer.

2. Any person violating any of the provisions of this Ordinance shall be deemed guilty of a Misdemeanor and upon conviction thereof shall be subject to a fine of not less than ten ($10.00) dollars, nor more than one hundred ($100.00) dollars, or imprisonment for not less than ten (10) days, nor more than thirty (30) days.

Motion to Dismiss

The Defendants in the above entitled Civil Action move the Court to dismiss the Complaint and Claim For Relief on the grounds that the Complaint and Claim For Relief fail to state sufficient grounds upon which relief can be granted; and the further ground that the verification attached to the said Complaint states that the Complaint deals chiefly with matters of law and legal inference and is signed by an attorney rather than one of the Plaintiffs; and further the Complaint does not comply with the Federal Rules of Civil Procedure in that it does not separately state the cause or causes of action and does not contain a clear and concise statement as required by said Rules.

* * *

Answer

Plaintiffs by their attorneys answer the motion to dismiss, motion to strike, and motion for more definite statements herein as follows:

A. Motion to dismiss

Defendants' motion to dismiss the complaint must be denied on the following grounds:

FIRST: that the complaint states a claim upon which relief can be granted in that it alleges that plaintiffs' rights to free speech, assembly and to petition for redress of grievances as guaranteed by the First and Fourteenth Amendments to the United States Constitution have been and continue to be violated;

* * *

October 20, 1965

John Doar, Esq.
Civil Rights Section
Department of Justice
Washington, D. C.

OCT 25 1965

Re: Dorchester County
South Carolina

Dear Mr. Doar:

I spoke with Frank Robinson, CORE Field Secretary, yesterday, who told me that he had just conferred with you. He informed me that you stated that you would need statements by parents, as well as by the children, who had been refused transfer or admittance to the white schools in Dorchester County.

On Wednesday, September 21, 1965 I wrote David Norman of your office respecting Dorchester County and enclosed with my letter the following:

1. Statement of Clara Lee Lewis.
2. Statement of Ollie Mae Utsey.
3. Statement of Anna William.
4. Statement of Beatrice Lemon.
5. Statement of Victoria De Lee.
6. Statement of Frank Robinson.

All of the above statements, except that of Mr. Robinson, were given by parents whose children had been refused transfer. All of those statements requested the Attorney General to bring a suit to desegregate the schools.

On September 22, 1965 I wrote to the Department of Health, Education and Welfare respecting the school districts 1, 2 and 3 in Dorchester County. I sent a copy of that letter to Mr. Norman.

On October 6, 1965 I again wrote to Mr. Mordecai Johnson of the Department of Health, Education and Welfare, and sent a copy to you. That letter contained several statements respecting the school situation in school district #2.

I am enclosing for the Department's consideration another copy of my letters of September 21, 1965 and September 22, 1965 referring to the above. I trust that the statements annexed to the letter of September 21st will provide the Department with the appropriate basis upon which it can bring a suit to desegregate the school system. I do not understand why you need further statements from the parents, since these have already been forwarded to your office.

Sincerely,

Henry M. di Suvero
Staff Counsel

HMdiS:cpm
Enc. 2

cc: Frank Robinson, CORE Field Secretary

Carl Rachlin, Esq.

Dorchester County

December 13, 1965

Honorable Jacob Javits
United States Senate
Washington 25, D. C.

Dear Mr. Javits:

I am writing to request your assistance in a matter which arises in Dorchester County, but which involves the conduct of the Department of Justice, and specifically its Civil Rights Section.

This summer, as a volunteer lawyer for the Lawyers Constitutional Defense Committee of the American Civil Liberties Union, I spent three weeks in Dorchester County, South Carolina. I acted as attorney for the Congress of Racial Equality, and Mr. Frank Robinson, CORE's local field secretary. In October I accompanied a delegation of residents to Washington and conferred with Mr. John Doar of the Department of Justice. We reported to him that the few Negro students who had been permitted to transfer into the previously all white schools were being constantly harrassed and physically abused. Previous to our visit, we had supplied both the Department and the FBI numerous statements recounting these incidents. At our meeting with Mr. Doar we requested that the Department of Justice bring a school desegregation suit to compel the Dorchester County school districts to fully integrate. Mr. Doar said that he would promptly attend to the matter.

Subsequent to this conference, other incidents arose which were also reported to the Department of Justice, both by way of letter and by way of statements given to the FBI. In November another delegation went to Washington to confer with Mr. Doar, and again Mr. Doar assured the group that the Department of Justice would act in this matter. Two weeks ago, a third delegation went to Washington, and this time met with the Attorney General himself, and again quick action was promised.

The sad commentary on the Department's activities in dealing with the numerous requests that have been made is that it has done nothing to bring about an end to school segregation in Dorchester County.

Honorable Jacob Javits December 13, 1965

You may be interested to know that the Brooklyn College student body has adopted Dorchester County as a student project, and is involved in various activities designed to assist the civil rights activity of the Negro community. Other New Yorkers are also interested in Dorchester County. A delegation from a Queens church has chartered a bus, and visited the community over the Thanksgiving weekend.

We all are dismayed at the complete lack of activity by the Department of Justice in bringing about an end to school segregation in Dorchester County. The failure of the Department to act has given aid and comfort to the local white power structure. Just last week sixteen Negro youths were arrested and convicted on account of their peaceful picketing of a Negro school. The Negro community has become frightened and despairing. I am not in a position to bring a school desegregation suit and there is no local Negro attorney who can bring one. The situation calls for fast action by the Department of Justice.

As a constituent of yours, and as a concerned citizen, I request that you use your good offices to ensure that the deprivation of equal rights will not continue, and that the Deparment of Justice will act promptly in this matter.

Very truly yours,

HMdiS:sl Henry M. di Suvero

CC: Mr. Frank Robinson, CORE Field Secretary
Mr. Carl Rachlin, CORE General Counsel
Mr. Henry Schwarzchild, Executive Director
Lawyers Constitutional Defense Committee

Same letter: Sen. Kennedy
Cong. Farbstein
Cong. Wm. F. Ryan

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FOREIGN AFFAIRS

Congress of the United States
House of Representatives
Washington, D. C.

WASHINGTON OFFICE
SUITE 1066, RAYBURN
CAPITOL 4-3121, EXT. 5555

December 16, 1965

Mr. Henry M. Di Suvero, Staff Counsel
New York Civil Liberties Union
156 FifthAvenue
New York, N.Y. 10010

My dear Mr. Di Suvero:

I have forwarded your communication of December 13th to Mr. Doar at the Department of Justice, requesting an immediate reply.

I have also directed my Washington office to keep in constant contact with his office and upon receipt of any further word, I shall at once notify you.

With kind regards, I am

Sincerely yours,

Leonard Farbstein

LEONARD FARBSTEIN
MEMBER OF CONGRESS

LF:bk

JAN 2 5 1966

Honorable William F. Ryan
House of Representatives
Washington, D. C.

Dear Congressman Ryan:

In your letter of January 10, 1966, you ask for a report on a letter you had received from Henry M. di Suvero, of the New York Civil Liberties Union. Mr. di Suvero criticized what he believed was the failure of this Department to act on complaints relating to racial discrimination in the operation of the public schools in Dorchester County, South Carolina.

I would like to give you a full report on the school situation in Dorchester County and our action following the receipt of Title IV complaints from parents of Negro students of Dorchester County.

Dorchester County lies in the south-central areas of the state, just inland from Charleston. The area of the county is divided into three school districts. School District No. 1, which includes the city of St. George, has a school population of approximately 1400 Negroes and 675 whites. School District No. 2, which includes the City of Summerville, has somewhat over 1600 Negroes and approximately 2470 whites. In School District No. 3, which includes the cities of Harleyville and Ridgeville, there are approximately 1000 Negro students, 650 whites, and 75 Indians--each of which groups has been educated in separate schools.

All three Dorchester County school districts submitted school desegregation plans to the Commissioner of Education last summer in order to qualify for federal financial assistance. Although

none of these plans had been approved by the Commissioner by the time that schools opened for the fall semester of the 1965-66 school year, each of these school districts took some steps to implement its plan and enrolled a limited number of Negro children in formerly all-white schools. Negotiations between the school authorities in each of these districts and the Commissioner continued after school opening. Recently the desegregation plan of School District No. 2 was approved by the Commissioner after considerable modification from its original form. No plan has as yet been approved for either School District No. 1 or School District No. 3.

In September and October of last year, Mr. di Suvero transmitted complaints by parents of Negro children attending schools in Dorchester County to both the Department of Health, Education, and Welfare, and this Department. On October 27, 1965, this Department requested the Federal Bureau of Investigation to investigate in detail the allegations of racial discrimination and intimidation in the Dorchester County schools. After the reports of this investigation had been received (November 22, 1965) and reviewed, attorneys from this Division visited Dorchester County in order to interview the available witnesses (December 16-20, 1965).

As a result of our inquiries this Department has determined that the complaints of discrimination relating to School District No. 1 and School District No. 3 are meritorious, which determination is a prerequisite to action by the Attorney General under Title IV of the Civil Rights Act of 1964.

As required by the terms of Title IV, I notified (January 20, 1966) the appropriate authorities in School District No. 1 and School District No. 3 of the complaints in order that they may have a reasonable opportunity to correct the complained-of conditions. Affording this opportunity to the school authorities is a prerequisite to any legal action by the Attorney General under Title IV.

I have also been advised that the Commissioner of Education has scheduled a meeting with School District No. 1 and 3 for Saturday, January 29, to discuss the same problem about which we are objecting.

In view of the adoption of an acceptable desegregation plan by Dorchester County School District No. 2, I have determined that further action by this Department is unnecessary with respect to that district.

Sincerely,

JOHN DOAR
Assistant Attorney General
Civil Rights Division

New York Civil Liberties Union

Affiliated with the American Civil Liberties Union

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International Work Adviser

February 3, 1966

Mrs. Geneva Tracy
107 Franklin Avenue
St. George, South Carolina

FEB 7 1966

Dear Mrs.Tracy:

John Hogden of the Department of Health Education and Welfare has informed me that school districts one and three have decided to conduct a re-registration period in compliance with the free choice plan suggested by the Department. As soon as the plan is approved by the Department, they will publish it in the paper.

You can expect that the registration period will occur for a period of one week in the month of February. All students will be permitted to transfer to the white schools. This will apply in both school districts one and three.

I suggest that you start informing the community so that when the transfer applications become available everybody will be prepared to take advantage of the program.

Kind regards.

Sincerely,

Henry M. di Suvero
Staff Counsel

HMdiS:cpm

bcc: Ernest Finney, Esq.
Carl Rachlin, Esq.
Henry Schwarzschild

New York Civil Liberties Union

Affiliated with the American Civil Liberties Union

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International Work Adviser

Dorchester

February 3, 1966

FEB 7 1966

Mrs. Victoria De Lee
Box 142, Route 2
Ridgeville, South Carolina

Dear Mrs. De Lee:

John Hogden of the Department of Health Education and Welfare has informed me that school districts one and three have decided to conduct a re-registration period in compliance with the free choice plan suggested by the Department. As soon as the plan is approved by the Department, they will publish it in the paper.

You can expect that the registration period will occur for a period of one week in the month of February. All students will be permitted to transfer to the white schools. This will apply in both school districts one and three.

I suggest that you start informing the community so that when the transfer applications become available everybody will be prepared to take advantage of the program.

Kind regards.

Sincerely,

Henry M. di Suvero
Staff Counsel

HMdiS:cpm

bcc: Ernest Finney, Esq.
Carl Rachlin, Esq.
Henry Schwarzschild

Congress of the United States
House of Representatives
Washington, D.C.

Dorchester County S. Car

FEB 7 1966

February 3, 1966

Mr. Henry M. di Suvero
Staff Counsel
New York Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

Dear Mr. di Suvero:

In response to your letter concerning the desegregation of the schools in Dorchester County, I have now received a full report from the Department of Justice.

I am enclosing a copy of that report. If you have any questions or comments concerning the report, please do not hesitate to contact me.

With warmest regards,

Sincerely,

William F. Ryan

William F. Ryan
Member of Congress

WFR:jn
Enclosure

New York Civil Liberties Union
Affiliated with the American Civil Liberties Union
156 FIFTH AVENUE • NEW YORK, N. Y. 10010 • WAtkins 9-6076

Aryeh Neier
Executive Director
Henry M. di Suvero
Staff Counsel
Alan H. Levine
Staff Counsel

May 3, 1966

MAY 9 1966

Carl Rachlin, Esq.
165 East 46th Street
New York, N.Y. 10036

Re: Tracy v. Robbins
Civil Action 8781/65

Dear Carl:

This was sent out Monday for filing by Wednesday. I am sorry I didn't reach you at home last Sunday before you took off.

I hope your trip was a good one and that I will hear from you.

Kind regards,

Sincerely,

Hank

HMdiS:cpm
Enc.

252

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2209 Dryades Street
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(504) 523-1797

RICHARD B. SOBOL
Staff Counsel

August 30, 1966

Carl Rachlin, Esq.
Scholarship, Education and Defense
Fund for Racial Equality
150 Nassau Street
New York, N.Y.

Re: Tracy v. Robbins (CA4)

Dear Carl:

Enclosed please find a copy of the bill for the printing of the brief on appeal in the above entitled case. I enclose another copy of the brief.

As per your agreement with Hank diSuvero, may I have a check from the SEDFRE for one half the bill, of $149.76?

Cordially,

Copy

Henry Schwarzschild
Executive Director

HS:c
Encs.

[Enclosed, Schwarzschild to Rachlin, 1966, August 30]

TELEPHONE WO 6-3906

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AUG 30 1966

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Tracy v. Robbins

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1/2 to CORE/SEDF

September 1, 1966

MEMORANDUM

TO: MARVIN RICH

FROM: CARL RACHLIN

RE: TRACEY V. ROBBINS

S.C. St Geo
Orch Cty

This is a case in South Carolina involving a major injunction which was handled for us and L.C.D.C. jointly by Henry DiSuvero. There is a bill enclosed which I agreed to pay half for the printing of the brief in the Fourth Circuit Court of Appeals. Our share is $149.76 and as Henry Schwarzchild's memorandum acknowledges, he has apparently paid the entire amount.

September 2, 1966

Mr. Henry Schwarzchild
Lawyers Constitutional
Defense Committee
156 Fifth Avenue
New York, New York

Dear Henry:

I have passed on your bill in Tracey v. Horne to Marv Rich and I am sure it will be taken care of shortly.

Sincerely,

Carl Rachlin
General Counsel

CR:tp
cc: Henry diSuvero

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HENRY M. DI SUVERO, ALAN H. LEVINE, STAFF COUNSEL

September 21, 1966

Carl Rachlin, Esq.
C. O. R. E.
150 Nassau Street
New York, N.Y. 10038

RE: Tracey v. Horn

Dear Carl:

Thanks for your note of September 19th.

Under the rules, oral argument occurs some time after the submission of the appellees' brief. I anticipate receiving a motion for extension of time to file that brief sometime this week. (Because I filed late, with an extension.) In any event, I will keep you posted.

We have already amended our complaint as to the defendant police chief, and you should have a copy of that amended complaint in the file.

As far as sharing the argument goes, I would, of course, be delighted to share it with you. I have no particular preference; why don't you make your choice.

By the way, has Marv Rich seen his way to paying the printing bill?

Sincerely,

Henry M. di Suvero
Staff Counsel

HMdiS:sba

Haines, Herbert deft

direct

Parker in Upsley - 14 yrs -
1½ yrs postmaster in Ridgeville

On day 20th was upstairs in
Whitey at 3:30 he was
waiting on customer when
~~customer~~ he was hit place.
Hand horse - went h
front of store - incident
over & carrying Ernest
Green into car

He was wearing pale
yellow shirt gray pants
wearing tie + pants
the same - gray

Cross exa-
He had pockets no mind
he began duty that day
he was waiting on a Richard
Meyers at the time

redir

Richard Minus - Sanatorium
for state health dept
they are
noticed picketing
in store bought sports tee, hit -
sold by Herbert Haines
while visiting w/ tickets - heard
noise - he saw colored boy
hit - didn't see who hit
boy hit
family at the beach
no conversation with Haines
about tickets
4 or 5 people in store at
time - don't know whether
it was a ~~f~~ male or female

knows Haines at least 14 years

two weeks
up that they in 14 yrs
on Aug 20 about 3:30 she
was in store
Herbert said don't buy

pickets on my mind
She felt bad that day
sitting in chair in middle of
store

She heard someone say
"He's pinched them" when
to front of store

Cross-ex
Some people in front of store
watching picket — about dozen
people inside the store

defense rests

Mrs Williams has no motive to lie - if anything her family will suffer economically by her testimony against H

Judge -

We have a sincere sheriff and police chief

Racial tension is not bad but prejudice cannot be given by police -

I hope grievances can be worked out peacefully - funds

dy 1/- not guilty

[nothing said as to
unpresses 7/- ~~nothing said~~
~~as to~~

nothing said as to prisoner
a burden of him

Tyson, Bertrand O. vs Cazes, Clarence J. Nov., 1964

Box 43
Folder 26

Wisconsin

Please Retain Original Order

THE FOLLOWING PAGE(S) ARE THE BEST COPY AVAILABLE.

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF LOUISIANA

Baton Rouge Division

DR. BERTRAND O. TYSON, Plaintiff,	CIVIL ACTION NO. 3095
vs.	AFFIDAVIT IN OPPOSITION TO MOVING DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT
Lt. Clarence J. Cazes, Officer Lionel Stein, Officer Lester Haydel, Jr., Officer Samuel Savage, Chief of Police Dennis Songy, Mr. Offie Stewart, Mrs. Lydia Stewart, Defendants.	

Before me, the undersigned authority, personally came and appeared Bertrand O. Tyson who, upon being duly sworn, deposed and said:

That the factual allegations set forth in the complaint in this action: to wit, the allegations of paragraphs 2, 3, 5 and 7 to 19, inclusive, are true and correct in all respects and are hereby incorporated in this affidavit by reference with the same force and effect as if fully set forth herein.

That the illegal action of defendants Clarence J. Cazes, Lionel Stein, Lester Haydel, Jr., Samuel Savage and Dennis Songy in causing plaintiff to be arrested for, charged with and jailed, prosecuted and tried for crimes of which said officials at all times knew him to be innocent was taken in their official capacities as law enforcement officials of the City of Plaquemine, Parish

of Iberville, State of Louisiana in support of a local custom and usage of discrimination against Negroes in public establishments and for the purpose of discriminatorily harassing and degrading plaintiff in order to discourage him and other Negroes in his and their efforts to obtain treatment equal to that accorded white persons.

Bertrand G. Tyson

Sworn to and subscribed
before me this day
of November, 1964

Notary Public

CERTIFICATE

I hereby certify that a copy of the above and foregoing affidavit has this day been mailed to Edward N. Engolio, Esq., attorney for defendants Clarence J. Cazes, Lionel Stein, Lester Haydel, Jr., Samuel Savage and Dennis Songy at 514 Railroad Avenue, Plaquemine, Louisiana and to William O. Templet, Esq., attorney for defendant Offie Stewart at Canal Building, Plaquemine, Louisiana.

Baton Rouge, Louisiana, November , 1964.

Murphy W. Bell

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF LOUISIANA

Baton Rouge Division

- - - - - - - - - - - - - - - - - - - x

DR. BERTRAND O. TYSON, :

Plaintiff, : CIVIL ACTION NO. 3055

vs. :

Lt. Clarence J. Cazes, :
Officer Lionel Stein,
Officer Lester Haydel, Jr., :
Officer Samuel Savage,
Chief of Police Dennis Songy, :
Mr. Offie Stewart,
Mrs. Lydia Stewart, :

Defendants. :

- - - - - - - - - - - - - - - - - - - x

MEMORANDUM IN OPPOSITION TO
MOVING DEFENDANTS' MOTION
TO DISMISS AND FOR SUMMARY
JUDGMENT

Introduction:

The motion of moving defendants should be denied because the complaint states a claim upon which relief can be granted and plaintiff's material allegations of fact are not controverted in the affidavit submitted in support of their motion by moving defendants. Even if moving defendants did controvert the facts the disagreement between parties would present issues of fact requiring denial of the motion. Fed.R.Civ.P. 12, 56.

As the United States Court of Appeals for this Circuit has firmly held, a complaint should not be dismissed on motion unless, upon any theory, it appears to a

certainty that plaintiff would be entitled to no relief under any state of facts that could be proved in support of his claim. Des Isles v. Evans, 200 F.2d 614, 615-6 (5th Cir. 1952).

Plaintiff's Claim:

The substance of plaintiff's allegations is simple; his claim is clear and his injury cries out for redress. As shown in the complaint and plaintiff's affidavit submitted in opposition to the motion:

> Merely because he was a Negro seeking service in a public establishment that refuses, in accordance with local custom and usage, to serve Negroes, plaintiff was arrested for, charged with and jailed, prosecuted and tried for crimes of which the arresting, charging and jailing and prosecuting officials at all times knew him to be innocent. The action of such officials -- who are the moving defendants here -- was taken in their official capacities as law enforcement officials of the City of Plaquemine, Parish of Iberville, State of Louisiana, in support of a local custom and usage of discrimination against Negroes in public establishments and for the purpose of discriminatorily harassing and degrading plaintiff in order to discourage him and other Negroes in his and their efforts to obtain treatment equal to that accorded white persons.

On these facts, which are uncontroverted in the affidavit submitted by moving defendants in support of their motion,* disposition of this motion is firmly governed by the recent decision of the United States Court of Appeals for this Circuit in Nesmith v. Alford, 318 F.2d 110 (5th Cir. 1963), cert. denied, 375 U.S. 975 (1964). That case, which is squarely in point here, establishes the validity of plaintiff's claim (42 U.S.C. §§ 1983, 1985) and the presence of federal jurisdiction without regard to diversity of citizenship (28 U.S.C. §§ 1343, 1331) and without regard to amount in controversy (28 U.S.C. § 1343). It requires that the motion of moving defendants be denied in all respects.

see also Pierson v Ray but results not really in point

This is wrong

The following additional law supports plaintiff's claim and emphasizes the lack of merit in the motion of moving defendants:

1. As alleged, the unlawful action of the moving defendants constitutes a misuse of their power, possessed by virtue of state law and made possible only because they were clothed with authority of state law. Under the circumstances, such unlawful action is "under color of state law" for purposes of 42 U.S.C. §§ 1983 and 1985. Baldwin v. Morgan, 251 F.2d 780 (5th Cir. 1958); see Yates v. Village of Hoffman Estates, Illinois, 209 F. Supp. 757 (N.D. Ill. 1962);

* The statement in the affidavit of the moving defendants that they did not violate plaintiff's constitutional rights is a mere conclusion and has not specificity enough to controvert the facts of plaintiff's claim.

2. Federal jurisdiction in a case such as this, involving violations of 42 U.S.C. §§ 1983 and 1985, exists regardless of whether a state court remedy exists. Monroe v. Pape, 365 U.S. 167 (1961);

3. The official nature of the acts of the moving defendants in this case does not protect them from civil liability. Monroe v. Pape, supra.

Defendants' Contentions:

The contentions made by the moving defendants are all without merit.

First, they argue lack of federal jurisdiction relying on the absence of diversity of citizenship. True, there is no diversity here; plaintiff has not contended that there is; as already shown above, federal jurisdiction exists here under 28 U.S.C. § 1343. It also exists under 28 U.S.C. § 1331. Neither section requires diversity.

Second, they argue lack of federal jurisdiction relying on absence of jurisdictional amount. This argument is frivolous. The amount in controversy has no bearing on federal jurisdiction under 28 U.S.C. § 1343. Further, in so far as 28 U.S.C. § 1331 is applicable, it is apparent from the complaint and plaintiff's affidavit in opposition to the motion that the damages suffered by plaintiff greatly exceed $10,000. Compare, Nesmith v. Alford, supra.

Finally, they argue that the complaint fails to state a claim upon which relief can be granted. Their argument in support of this last contention rambles over considerable ground. As already shown above, however,

the complaint unquestionably states a claim upon which relief can be granted. Accordingly, it is unnecessary to consider in detail the numerous hypothetical musings in which the moving defendants indulge.

Conclusion:

Plaintiff respectfully submits that the moving defendants' motion to dismiss and for summary judgment should be denied in all respects.

Respectfully submitted,

Murphy W. Bell
971 South 13th Street
Baton Rouge, Louisiana
Attorney for Plaintiff,
Dr. Bertrand O. Tyson

CERTIFICATE

I hereby certify that a copy of the above and foregoing memorandum has this day been mailed to Edward N. Engolio, Esq., attorney for defendants Clarence J. Cazes, Lionel Stein, Lester Haydel, Jr., Samuel Savage and Dennis Songy at 514 Railroad Avenue, Plaquemine, Louisiana and to William O. Templet, Esq., attorney for defendant Offie Stewart at Canal Building, Plaquemine, Louisiana.

Baton Rouge, Louisiana, November , 1964.

Murphy W. Bell

file Bell ?

file 11/30

November 19, 1964

George Zeidenstein, Esq.
63 Wall Street
New York, N.Y.

Dear George,

I hope you will be able to send me a copy of the pleadings you have prepared for Murphy in Tyson v. Cazes.

By the way, we have in the Fifth Circuit at this moment going an appeal from an adverse jury verdict in a suit for civil damages for false arrest in Jackson, Mississippi.

Sincerely,

Carl Rachlin
General Counsel

cc: Murphy Bell, Esq.

CR:hdl

Lawyers Constitutional Defense Committee
9th FLOOR
156 FIFTH AVENUE
NEW YORK 10, N. Y.

November 9, 1964

Murphy W. Bell, Esq.
971 South 13th Street
Baton Rouge, Louisiana

Re: Tyson v. Cases

Dear Mr. Bell:

This is to inform you that we have obtained the kind cooperation of Mr. George Zeidenstein, an LCDC attorney who worked in Mississippi this summer, to prepare the necessary pleadings in Tyson v. Cases. Mr. Zeidenstein is with the law firm of Spear & Hill, 63 Wall Street, New York. He will have the papers ready no later than November 17, and I shall ask him to send them directly to you by airmail, special delivery.

I am returning the complaint and motion to dismiss to you herewith for your files. Mr. Zeidenstein has made copies.

Call him

Cordially yours,

Henry Schwarzschild
Executive Secretary

HS:s
Encs.
CC: George Zeidenstein, Esq.
Carl Rachlin, Esq.

GEORGE ZEIDENSTEIN
63 WALL STREET
NEW YORK

November 23, 1964

Carl Rachlin, Esq.
Congress of Racial Equality
38 Park Row
New York, New York

Re: Tyson v. Cazes

Dear Carl:

A set of the Tyson papers is enclosed. Unfortunately, pressure in the office prevented any really deep research. However, I think that the trial court will be hard put to grant defendants' motion in the light of the Nesmith case.

Sincerely,

George Zeidenstein

Enclosure

cc: Murphy W. Bell, Esq.
Mr. Henry Schwarzschild

copy to Murphy
Schwarzschild

NOV 24 1964

Dear George
Thank you for a copy of
the papers in Tyson v
Cazes. In my view
they should carry the
day. I take it there was no
common law action for
false arrest.
I hope to see you soon
Cordially
CR

Make case file
Tyson v. Cazes

November 30, 1964

George Zeidenstein, Esq.
63 Wall Street
New York, N.Y.

Dear George,

Thank you for the copy of your papers in Tyson v. Cazes. In my view they should carry the day. I take it there was no common law action for false arrest.

I hope to see you soon.

Cordially,

Carl Rachlin
General Counsel

cc: Murphy Bell, Esq.
Mr. Henry Schwarzchild

CR:hdl

United States vs. K.K.K. vs. Cove, May-Aug., 1961

Box 43
Folder 27

Please Retain Original Order

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

Filed May 20, 1961 Frank M. Johnson Jr. Judge

UNITED STATES,

Plaintiff

vs

U. S. KLANS, KNIGHTS OF THE KU KLUX KLAN, INC., a corporation; ALABAMA KNIGHTS, KNIGHTS OF THE KU KLUX KLAN, INC., a corporation; FEDERATED KU KLUX KLAN, INC., an unincorporated association represented by LESTER C. HAWKINS; ALVIN HORN; ROBERT M. SHELTON; LESTER C. HAWKINS; and THURMAN E. OUZTS,

Defendants

CIVIL ACTION NO. 1718-N

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

It appearing from the verified Complaint of the United States that the Gulf Transport Company, Southeastern Stages, Inc., and the Greyhound Corporation are interstate motor carriers certified by the Interstate Commerce Commission to carry passengers in and through Alabama, and that they are required by law to provide safe and adequate service in connection with such transportation; that defendants U. S. Klans Knights of the Ku Klux Klan, Inc., Alabama Knights, Knights of the Ku Klux Klan, Inc., Federated Ku Klux Klan, Inc., their officers, members and agents, Alvin Horn, Robert M. Shelton, Lester C. Hawkins, and Thurman E. Ouzts, for the purpose of compelling segregation of passengers according to race, have by force, violence, and threats prevented, and are conspiring to prevent, interstate passengers from using without unjust discrimination the transportation services of Gulf Transport Company, Southeastern Stages, Inc. and the Greyhound Corporation in and through Alabama, and have willfully damaged and destroyed the property of said carriers and have threatened and intimidated the drivers employed by the carriers in their efforts to provid such services, and that said defendants have thereby caused and are causing irreparable injury to the United States consisting

of the obstruction of and interference with the movement of interstate commerce, all before notice can be served on the defendants and a hearing had;

NOW, THEREFORE, IT IS ORDERED that

U.S. Klans, Knights of the Ku Klux Klan, Inc.
Alabama Knights, Knights of the Ku Klux Klan, Inc.,
Federated Ku Klux Klan, Inc.
Alvin Horn,
Robert Shelton,
Lester C. Hawkins, and
Thurman E. Ouzts

their officers, members, agents, employees and all persons acting in concert with them, be and they hereby are temporarily restrained from:

(a) Conspiring to interfere with the travel of passengers in interstate commerce through or in Alabama free from racial segregation and other unjust discrimination;

(b) Committing acts of violence upon, or threatening, intimidating, assaulting or harassing any passengers in interstate commerce in and through Alabama;

(c) Threatening, intimidating, or committing acts of violence upon or damaging the persons or property of the Gulf Transport Company, Southeastern Stages, Inc., or the Greyhound Corporation, their officers, agents, employees or drivers on account of their having carried, attempting to carry or carrying passengers in interstate commerce, and

(d) Otherwise obstructing, impeding or interfering with the free movement of interstate commerce in and through the State of Alabama.

It is further ORDERED that each of the defendants herein named appear before this Court in the United States District Court Hall, Montgomery, Alabama, on May 25th, 1961, at 10:00 o'clock A.m. to show cause, if any he has, why a preliminary injunction should not be issued pending a trial on the merits.

Frank M. Johnson Jr.
UNITED STATES DISTRICT JUDGE

Done, this 20th day of May, 1961
at 11:30 o'clock A.m.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

UNITED STATES,	)	
Plaintiff,	)	
v.	)	
U. S. KLANS, KNIGHTS OF THE KU KLUX KLAN, INC., a corporation; ALABAMA KNIGHTS, KNIGHTS OF THE KU KLUX KLAN, INC., a corporation; FEDERATED KU KLUX KLAN, INC., an unincorporated association represented by Lester C. Hawkins; ALVIN HORN; ROBERT M. SHELTON; LESTER C. HAWKINS, and THURMAN E. OUZTS,	)	CIVIL ACTION NO. 1718-N
Defendants.	)	

C O M P L A I N T

The United States alleges as a claim against the defendants:

1. This action is brought to protect the interest of the United States in the free and unobstructed movement of interstate commerce and in exercise of the constitutional power of the United States over such commerce, which power has been exercised by the Corgress by various and specific acts including 18 U.S.C. 33 and 49 U.S.C. 316.

2. This Court has jurisdiction of this action under 28 U.S.C. 1345.

3. U. S. Klans, Knights of the Ku Klux Klan, Inc., is a corporation chartered under the laws of Georgia and doing business within the State of Alabama and within this District. Among its purposes is the enforcement of segregation of the white and Negro races.

4. Alvin Horn is the chief officer and administrative head of the United States Klans, Knights of the Ku Klux Klan, Inc. He resides at Talladega, Alabama.

5. The Alabama Knights, Knights of the Ku Klux Klan, Inc., is a corporation chartered under the law of Alabama, doing business within the State of Alabama and within this District. Among its purposes is the enforcement of segregation of the white and Negro races.

6. Robert M. Shelton is the chief officer and administrative head of the Alabama Knights, Knights of the Ku Klux Klan, Inc. He resides in Tuscaloosa, Alabama.

7. The Federated Ku Klux Klan, Inc., is an unincorporated association doing business in Alabama. Its principal office is located in Montgomery. Among its purposes is the enforcement of segregation of the white and Negro races.

8. Lester C. Hawkins is an officer of the Federated Ku Klux Klan, Inc., and represents it and its members. He resides in Montgomery.

9. Thurman E. Ouzts is a resident of Montgomery, Alabama

10. Gulf Transport Company (hereafter referred to as Gulf) and Southeastern Stages, Inc. (hereafter referred to as Southeastern) are corporations engaged, under the name and style "Trailways," in the transport by motor carrier of passengers in inter-state commerce.

11. The Greyhound Corporation (hereafter referred to as Greyhound) is a corporation engaged in transportation by motor carrier of passengers in interstate commerce.

12. Gulf, Southeastern, and Greyhound, pursuant to the terms of certificates of public service and necessity issued by the Interstate Commerce Commission, and pursuant to the provisions of 49 U.S.C. 316, are authorized and required to provide safe and adequate motor carrier service in and through the State of Alabama including such service to and from the cities of Anniston, Birmingham, and Montgomery.

13. Gulf and Southeastern maintain in Anniston, Birmingham and Montgomery, Alabama, certain bus terminalsfor the accommodation on a racially segregated basis of their passengers, including passengers traveling in interstate commerce. The Trailways terminals and their

facilities are an integral and regular part of the interstate transportation service furnished and maintained by Gulf and Southeastern.

14. Greyhound maintains in Anniston, Birmingham and Montgomery, Alabama, certain bus terminals for the accommodation on a racially segregated basis of its passengers, including passengers traveling in interstate commerce. The Greyhound bus terminals and their facilities are an integral and regular part of the interstate transportation service furnished and maintained by Greyhound.

15. In April, 1961, an organization known as the Congress of Racial Equality (hereafter referred to as CORE) announced its plan to send a group of representatives of both the white and Negro races by motor carrier from Washington, D. C., to New Orleans, Louisiana, by way of Birmingham and Montgomery for the purpose of determining whether facilities of interstate commerce, including motor buses and terminal facilities in Anniston, Birmingham and Montgomery, were being operated on a racially segregated basis and, if so, to demonstrate peaceably against such segregation. The plans for such trip were a matter of common public knowledge in Alabama and were known to the defendants prior to May 14.

16. Commencing in April 1961 and continuing to the present time the U. S. Klans, Knights of the Ku Klux Klan, Inc., the Alabama Knights, Knights of the Ku Klux Klan, Inc., Federated Ku Klux Klan, Inc., their officers and members, Robert M. Shelton, Alvin Horn, Lester C. Hawkins, Thurman E. Ouzts and other persons unknown to the plaintiff, have conspired to prevent, by violence, force, threats, intimidation and harassment, persons of both the white and Negro races from freely exercising their right to travel in interstate commerce through Alabama and to so travel without unjust discrimination. It was and is a part of the conspiracy that the conspirators would intercept motor carriers entering or traveling through Alabama whenever the passengers of such carriers were seated in a racially non-segregated manner and to prevent such carriers and passengers from traveling in interstate commerce within the State of Alabama by damaging and destroying the vehicles and by beating, assaulting,

threatening, intimidating and harassing the drivers and passengers of such vehicles.

17. On May 14, 1961, the representatives of CORE referred to in paragraph 15 were traveling in interstate commerce toward Birmingham in two groups -- one group in a Greyhound bus and the other group in a Trailways bus.

18. On May 14, 1961, the defendants and their co-conspirators, in furtherance of the conspiracy, assembled in the Greyhound bus terminal in Anniston, Alabama. While the defendants were so assembled, the Greyhound bus carrying one group of the CORE representatives stopped at the terminal. The defendants and their co-conspirators thereupon by force, threats and violence prevented the passengers on the bus from alighting and they damaged the bus by breaking its windows and slashing its tires.

19. As a result of the damage inflicted by the defendants as described in the preceding paragraph, the Greyhound bus after departing from the terminal in Anniston was compelled to stop on the highway between Anniston and Birmingham. The defendants and their co-conspirators thereupon set fire to and destroyed the bus and threatened to and did injure the passengers. Law enforcement officers of the State of Alabama, present at the time, were unable to prevent the acts and conduct of the defendants described in this paragraph or to arrest those responsible.

20. On May 14, 1961, certain of the defendants and their co-conspirators boarded the Trailways bus at Anniston, Alabama, carrying the second group of CORE representatives, and assaulted, beat, struck and threatened the passengers.

21. On May 14, 1961, upon the arrival of the Trailways bus referred to in the preceding paragraph at the Trailways bus terminal in Birmingham, the defendants and their co-conspirators in furtherance of the conspiracy again unlawfully beat, assaulted, intimidated, threatened and harassed the passengers.

22. On May 15, 1961, John Patterson, Governor of Alabama, issued a public statement that it was not safe for the representatives of CORE, referred to in paragraph 15, to remain in the State of Alabama. He stated that in his judgment it was not safe for them to travel from Birmingham

to Montgomery and that it was impossible for the State of Alabama to guarantee their safety.

23. On May 17, 1961, a group of white and Negro college students in Tennessee announced their intention to travel by motor carrier from Nashville, Tennessee, to New Orleans, Louisiana, by way of Birmingham and Montgomery. It was the announced purpose of these students to determine whether they could use the instrumentalities of interstate commerce on such trip without racial segregation or other unjust discrimination and to demonstrate peaceably against any such discrimination should it occur.

24. When the students referred to in the preceding paragraph arrived by Greyhound bus at the Greyhound bus terminal in Birmingham on May 17, 1961, police officers of the City of Birmingham prevented them from alighting from the bus for a period in excess of one hour for the announced reason of preventing acts of unlawful violence upon the students. Greyhound, its employees and drivers, were unable to move the bus from the terminal or to transport the students from Birmingham for fear of damage to the bus and injury to the driver and its passengers at the hands of the defendants and their co-conspirators.

25. On May 17, 1961, officers of the Birmingham Police Department took into custody and imprisoned in the Birmingham City Jail the students referred to in paragraph 23 for the announced purpose of preventing acts of violence and intimidation from being committed upon the students. Thereafter, on the night of May 18, 1961, the officers transported the students to and released them at the Alabama Tennessee border.

26. On May 19, 1961, the students referred to in paragraph 23, along with others, returned to Birmingham by private automobile and again sought transportation by Greyhound bus from Birmingham to Montgomery. Greyhound thereupon cancelled its scheduled bus trips from Birmingham to Montgomery for a period of eighteen hours until the morning of May 20, 1961, at which time the students boarded with other passengers and departed on a Greyhound bus for Montgomery under heavy police escort. The police escort accompanied the bus to a point just outside the Birmingham city limits.

27. On the morning of May 20, 1961, it was a matter of common public knowledge in Montgomery that the Greyhound bus referred to in the preceding paragraph was enroute from Birmingham to Montgomery with the students, and such fact was known to the defendants.

28. On May 20, 1961, when the Greyhound bus bearing the students from Birmingham arrived in Montgomery, and after the passengers had alighted from the bus, the defendants, in concert with others unknown to the plaintiff, and in furtherance of the conspiracy assaulted, beat, bludgeoned, kicked and injured the passengers who had ridden on the bus and seized and damaged their baggage. As a result of the beatings administered by the defendants, a number of the passengers were rendered unconscious and they, as well as others, required medical care and hospitilization. By the means herein described the defendants forcibly expelled the bus passengers from the Greyhound bus terminal in Montgomery and forcibly interrupted their interstate journey.

29. As a result of the acts and conduct of the defendants and their co-conspirators in furtherance of the conspiracy as herein described, Gulf, Southeastern and Greyhound, together with their employees, agents and drivers, have been unable to maintain regular schedules of travel or to provide safe and adequate service in Alabama.

30. The acts, conduct and conspiracy of the defendants and their co-conspirators, as herein described, obstruct, interfere with, and constitute an undue burden upon interstate commerce.

31. State and local law enforcement officers of Alabama have failed and are failing to prevent or remove the unlawful obstructions to and interference with interstate transportation of passengers herein alleged.

32. The plaintiff, having an interest in the movement of interstate commerce free from unlawful obstruction or interference, and having a duty to remove any such obstruction or interference when it occurs, will suffer immediate and irreparable injury from the acts, conduct and conspiracy of the defendants as herein alleged, and plaintiff has no adequate remedy against such injury other than this action for an injunction.

Wherefore, plaintiff prays that this Court enter an order enjoining the defendants, their officers, members, agents, employees and all other persons acting in concert with them from:

(a) Conspiring to interfere with the travel of passengers in interstate commerce through Alabama free from racial segregation and other unjust discrimination;

(b) Committing acts of violence upon, or threatening, intimidating, assaulting or harrassing any passengers in interstate commerce in or through Alabama;

(c) Threatening, intimidating, committing acts of violence upon or injuring the persons or property of the Gulf Transport Company, Southeastern Stages, Inc., the Greyhound Corporation, their officers, agents, employees or drivers, on account of their carrying, attempting to carry or having carried passengers in interstate commerce without unjust discrimination, and

(d) Otherwise obstructing, impeding, or interfering with the free movement of interstate commerce in and through the State of Alabama.

Plaintiff further prays that the Court enter an order without notice temporarily restraining the defendants pending a hearing on plaintiff's application for a preliminary injunction; that a preliminary injunction be entered pending a trial on the merits and that a permanent injunction be issued after trial, and that the Court grant such further relief as the interests of justice may require.

HARRY WELLS DAVIS
United States Attorney

JOHN DOAR, Attorney
Department of Justice

W. JOHN BARRETT, Attorney
Department of Justice

STATE OF ALABAMA)
)
COUNTY OF MONTGOMERY)

John Doar, being first sworn, says that he is an attorney of the United States Department of Justice, that he has read the foregoing complaint, and that he is informed and believes that the facts alleged therein are true.

JOHN DOAR
Attorney, United States
Department of Justice

Sworn to and subscribed before me
This 20th day of May, 1961.

HELEN V. STAGGERS
Notary Public, In and for the
State of Alabama at Large

Filed 5.20.61
C. C. Dobson
Clerk

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

- - - - - - -

UNITED STATES,	)	
Plaintiff	)	
vs.	)	CIVIL ACTION NO. 1718-N
U.S. KLANS, KNIGHTS OF THE KU KLUX KLAN, INC., a corporation; ALABAMA KNIGHTS, KNIGHTS OF THE KU KLUX KLAN, INC., a corporation; FEDERATED KU KLUX KLAN, INC., an unincorporated association represented by Lester C. Hawkins; ALVIN HORN; ROBERT M. SHELTON; LESTER C. HAWKINS; THURMAN E. OUZTS; CLAUDE V. HENLEY; EUGENE T. CONNOR, Commissioner of Public Safety of Birmingham; JAMIE MOORE, Chief of Police of Birmingham; LESTER B. SULLIVAN, Commissioner of Public Safety of Montgomery; and GOODWIN J. RUPPENTHAL, Chief of Police of Montgomery,	)	
Defendants	)	

A M E N D E D C O M P L A I N T

The United States alleges as a claim against the defendants:

1. This action is brought to protect the interest of the United States in the free and unobstructed movement of interstate commerce and in exercise of the constitutional power of the United States over such commerce, which power has been exercised by the Congress by various and specific acts including 18 U.S.C. 33 and 49 U.S.C. 316.

2. This Court has jurisdiction of this action under 28 U.S.C. 1345.

3. U.S. Klans, Knights of the Ku Klux Klan, Inc., is a corporation chartered under the laws of Georgia and doing business within the State of Alabama and within this District. Among its purposes is the enforcement of segregation of the white and Negro races.

4. Alvin Horn is the chief officer and administrative head of the United States Klans, Knights of the Ku Klux Klan, Inc. He resides at Talladega, Alabama.

5. The Alabama Knights, Knights of the Ku Klux Klan, Inc., is a corporation chartered under the law of Alabama, doing business within the State of Alabama and within this District. Among its purposes is the enforcement of segregation of the white and Negro races.

6. Robert M. Shelton is the chief officer and administrative head of the Alabama Knights, Knights of the Ku Klux Klan, Inc. He resides in Tuscaloosa, Alabama.

7. The Federated Ku Klux Klan, Inc., is an unincorporated association doing business in Alabama. Its principal office is located in Montgomery. Among its purposes is the enforcement of segregation of the white and Negro races.

8. Lester C. Hawkins is an officer of the Federated Ku Klux Klan, Inc., and represents it and its members. He resides in Montgomery.

9. Thurman E. Ouzts and Claude V. Henley are residents of Montgomery, Alabama.

10. Eugene T. Connor is Commissioner of Public Safety of the City of Birmingham and as such is responsible under the laws, ordinances, and regulations of the State of Alabama and of the City of Birmingham for the general supervision and administration of the Birmingham Police Department and for maintaining the peace and enforcing the law within the city. He resides in Birmingham.

11. Jamie Moore is Chief of Police of Birmingham and as such is responsible, under the direction of Eugene T. Connor, for the organization, direction, and supervision of the Birmingham Police Department and its officers, and is responsible within the City for preserving the peace, enforcing the law, and arresting violators of the laws and ordinances of Alabama and of the City of Birmingham. He resides in Birmingham.

12. Lester B. Sullivan is Commissioner of Public ~~Works~~ Safety of the City of Montgomery and as such is responsible under the laws, ordinances and regulations of the State of Alabama and of the City of Montgomery for the general supervision and administration of the Montgomery Police Department and for maintaining the peace and enforcing the law within the City. He resides in Montgomery.

13. Goodwin J. Ruppenthal is Chief of Police of Montgomery, and as such is responsible, under the direction of Lester B. Sullivan, for the organization, direction, and supervision of the Montgomery Police Department and its officers, and is responsible within the City for preserving the peace, enforcing the law, and arresting violators of the laws and ordinances of Alabama and of the City of Montgomery. He resides in Montgomery.

14. Gulf Transport Company (hereafter referred to as Gulf) and Southeastern Stages, Inc. (hereafter referred to as Southeastern) are corporations engaged, under the name and style "Trailways," in the transport by motor carrier of passengers in interstate commerce.

15. The Greyhound Corporation (hereafter referred to as Greyhound) is a corporation engaged in transportation by motor carrier of passengers in interstate commerce.

16. Gulf, Southeastern, and Greyhound, pursuant to the terms of certificates of public convenience and necessity issued by the Interstate Commerce Commission, and pursuant to the provisions of 49 U.S.C. 316, are authorized and required to provide safe and adequate motor carrier service in and through the State of Alabama including such service to and from the cities of Anniston, Birmingham, and Montgomery.

17. Gulf and Southeastern maintain in Anniston, Birmingham, and Montgomery, Alabama, certain bus terminals for the accomodation on a racially segregated basis of their passengers, including passengers traveling in interstate commerce. The Trailways terminals and their facilities are an integral and regular part of the interstate transportation service furnished and maintained by Gulf and Southeastern.

18. Greyhound maintains in Anniston, Birmingham, and Montgomery, Alabama, certain bus terminals for the accommodation on a racially segregated basis of its passengers, including passengers traveling in interstate commerce. The Greyhound bus terminals and their facilities are an integral and regular part of the interstate transportation service furnished and maintained by Greyhound.

19. In April, 1961, an organization known as the Congress of Racial Equality (hereafter referred to as CORE) announced its plan to send a group of representatives of both the white and Negro races by motor carrier from Washington, D. C., to New Orleans, Louisiana, by way of Birmingham and Montgomery for the purpose of determining whether facilities of interstate commerce, including motor buses and terminal facilities in Anniston, Birmingham, and Montgomery, were being operated on a racially segregated basis and, if so, to demonstrate peaceably against such segregation. The plans for such trip were a matter of common public knowledge in Alabama and were known to the defendants prior to May 14.

20. Commencing in April 1961 and continuing to the present time the U.S. Klans, Knights of the Ku Klux Klan, Inc., the Alabama Knights, Knights of the Ku Klux Klan, Inc., Federated Ku Klux Klan, Inc., their officers and members, Robert M. Shelton, Alvin Horn, Lester C. Hawkins, Thurman E. Ouzts, Claude V. Henley, and other persons unknown to the plaintiff, have conspired to prevent, by violence, force, threats, intimidation and harassment, persons of both the white and Negro races from freely exercising their right to travel in interstate commerce through Alabama and to so travel without unjust discrimination. It was and is a part of the conspiracy that the conspirators intercept motor carriers carrying groups such as the representatives of CORE referred to in paragraph 19 and prevent such carriers and passengers from traveling in interstate commerce within the State of Alabama by damaging and destroying the vehicles and by beating, assaulting, threatening, intimidating and harassing the drivers and passengers of such vehicles.

21. On May 14, 1961, the representatives of CORE referred to in paragraph 19 were traveling in interstate commerce toward Birmingham in two groups--one group in a Greyhound bus and the other group in a Trailways bus.

22. On May 14, 1961, certain of the conspirators whose identities are unknown to the plaintiff assembled in the Greyhound bus terminal in Anniston, Alabama. While they were so assembled, the Greyhound bus carrying one group of the CORE representatives stopped at the terminal. The said conspirators thereupon by force, threats, and violence prevented the passengers on the bus from alighting and they damaged the bus by breaking its windows and slashing its tires.

23. As a result of the damage inflicted as described in the preceding paragraph, the Greyhound bus after departing from the terminal in Anniston was compelled to stop on the highway between Anniston and Birmingham. Robert Dale Couch, Ronald Eason, Frank B. Johnson, and Daleford Leonard Roberts, together with other persons unknown to the plaintiff, and in furtherance of the conspiracy, thereupon set fire to and destroyed the bus and threatened to and did injure the passengers. Law enforcement officers of the State of Alabama, present at the time, failed to prevent the acts and conduct of the defendants described in this paragraph or to arrest those responsible.

24. On May 14, 1961, certain of the conspirators whose identities are unknown to the plaintiff boarded at Anniston the Trailways bus carrying the second group of CORE representatives, and assaulted, beat, struck, and threatened the passengers.

25. On May 14, 1961, upon the arrival of the Trailways bus referred to in the preceding paragraph at the Trailways bus terminal in Birmingham, the defendant U.S. Klans, Knights of the Ku Klux Klan, Inc., its members, Alabama Knights, Knights of the Ku Klux Klan, Inc., its members, and other conspirators and persons to the plaintiff unknown, unlawfully beat, assaulted, intimidated, threatened, and harassed the passengers.

26. On May 14, 1961, the Birmingham Police Department having been advised of the expected arrival of the CORE representatives and knowing of the peril to their safety by the threatened unlawful acts of others, withheld police protection from the CORE representatives and failed and refused to prevent unlawful assaults upon and harassment of the CORE representatives.

27. On May 15, 1961, John M. Patterson, Governor of Alabama, issued a public statement that it was not safe for the representatives of CORE, referred to in paragraph 19, to remain in the State of Alabama. He stated that in his judgment it was not safe for them to travel from Birmingham to Montgomery and that it was impossible for the State of Alabama to guarantee their safety.

28. On May 17, 1961, a group of white and Negro college students in Tennessee announced their intention to travel by motor carrier from Nashville, Tennessee, to New Orleans, Louisiana, by way of Birmingham and Montgomery. It was the announced purpose of these students to determine whether they could use the instrumentalities of interstate commerce on such trip without racial segregation or other unjust discrimination and to demonstrate peaceably against any such discrimination should it occur.

29. On May 19, 1961, the students referred to in the preceding paragraph, along with others, sought transportation by Greyhound bus from Birmingham to Montgomery. Greyhound, fearing unlawful acts of violence, thereupon cancelled its scheduled bus trips from Birmingham to Montgomery for a period of eighteen hours until the morning of May 20, 1961, at which time the students boarded a bus with other passengers and departed for Montgomery.

30. On the morning of May 20, 1961, it was a matter of common public knowledge in Montgomery and was known to the Montgomery Police Department that the Greyhound bus referred to in the preceding paragraph was enroute from Birmingham to Montgomery with the students.

31. On May 20, 1961, when the Greyhound bus bearing the students arrived in Montgomery from Birmingham, and after the passengers had alighted from the bus, U.S. Klans, Knights of the Ku Klux Klan, Inc., its members, Alabama Knights, Knights of the Ku Klux Klan, Inc., its members, Federated Ku Klux Klan, Inc., its members, Thurman E. Ouzts and Claude V. Henley, together with other conspirators and persons to the plaintiff unknown, assaulted, beat, bludgeoned, kicked and injured the passengers who had ridden on the bus, and seized and damaged their baggage. As a result of the beatings administered by the defendants, a number of the passengers were rendered unconscious and they, as well as others, required medical care and hospitalization. By the means herein described, said defendants forcibly expelled the bus passengers from the Greyhound bus terminal in Montgomery and forcibly interrupted their interstate journey.

32. The Montgomery Police Department, knowing of the suspected arrival by bus of the students in Montgomery on May 20, 1961, deliberately failed to take measures to insure the safety of the students and to prevent unlawful acts of violence upon their persons.

33. While the unlawful acts of violence upon the students and other passengers of the bus were being committed, as described in paragraph 31, the Montgomery Police Department was notified of such violations of the law, but after receiving such notice deliberately delayed sending officers to the scene.

34. Plaintiff is informed and believes that the defendants referred to in paragraph 20 will, unless restrained by order of this court, continue their unlawful conspiracy, acts, and conduct.

35. Plaintiff is informed and believes that the Birmingham and Montgomery Police Departments will, unless restrained by order of this court, continue in their failure and refusal to provide protection for passengers traveling in interstate commerce, such as those described in paragraphs 19 and 28, and the motor carriers transporting such passengers.

36. The plaintiff, having an interest in the movement of interstate commerce free from unlawful obstruction or interference, and having a duty to remove any such obstruction or interference when it occurs, will suffer immediate and irreparable injury from the acts, conduct and conspiracy of the defendants as herein alleged, and plaintiff has no adequate remedy against such injury other than this action for an injunction.

Wherefore, plaintiff prays that this court enter an order--

(A) Enjoining U.S. Klans, Knights of the Ku Klux Klan, Inc., Alabama Knights, Knights of the Ku Klux Klan, Inc., Federated Ku Klux Klan, Inc., Alvin Horn, Robert M. Shelton, Lester C. Hawkins, Thurman E. Ouzts, Claude V. Henley, their agents, employees, officers, members, and all persons acting in concert with them from:

(1) Conspiring to interfere with the travel of passengers in interstate commerce through Alabama free from racial segregation and other unjust discrimination;

(2) Committing acts of violence upon, or threatening, intimidating, assaulting or harassing any passengers in interstate commerce in or through Alabama;

(3) Threatening, intimidating, committing acts of violence upon or injuring the persons or property of the Gulf Transport Company, Southeastern Stages, Inc., the Greyhound Corporation, their officers, agents, employees or drivers, on account of their carrying, attempting to carry or having carried passengers in interstate commerce without unjust discrimination, and

(4) Otherwise obstructing, impeding, or interfering with the free movement of interstate commerce in and through the State of Alabama.

(B) Enjoining Eugene T. Connor, Jamie Moore, Lester B. Sullivan, Goodwin J. Ruppenthal, their officers, agents, employees, and all those acting in concert with them from failing or refusing to provide police protection for persons traveling an interstate commerce through the cities of Birmingham and Montgomery, Alabama.

Plaintiff further prays that a preliminary injunction be issued pending a trial on the merits, that a permanent injunction be issued after trial, and that the Court grant such further relief as the interests of justice may require.

HARTWELL DAVIS
United States Attorney

JOHN DOAR, Attorney
Department of Justice

ST. JOHN BARRETT, Attorney
Department of Justice

CARL EARDLEY, Attorney
Department of Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF ALABAMA
NORTHERN DIVISION

UNITED STATES Plaintiff	*	
-vs-	*	CIVIL ACTION NO. 1718-N
U.S.KLANS, KNIGHTS OF THE KU KLUX KLAN, INC., ET AL. Defendants	*	

The defendants, Lester B. Sullivan and Goodwin J. Ruppenthal, move the Court as follows:

1. To make the following persons parties plaintiff or defendant, as the Court may decide in this cause:

Martin Luther King, Jr., presently at Hall Street, Montgomery, Alabama

Ralph D. Abernathy, 1327 Hall Street, Montgomery, Alabama

Wyatt Walker, Montgomery County Courthouse, Montgomery, Alabama

F. L. Shuttlesworth, 3193 29th Avenue, North, Birmingham, Alabama

Solomon S. Seay, Sr., R. F. D. 3, Montgomery, Alabama

~~Charles S. Conley, 530 South Union Street, Montgomery, Alabama~~

Students' Nashville Non-Violent Association, Fisk University, Nashville, Tennessee

/s/ Calvin Whitesell

Attorney for Defendants, Lester B. Sullivan and Goodwin J. Ruppenthal

Filed 5/30/61

COPY

...TED STATES,	)	UNITED STATES DISTRICT COURT
PLAINTIFF	)	MIDDLE DISTRICT OF ALABAMA
VS.	)	NORTHERN DIVISION
U. S. KLANS, KNIGHTS OF THE KU KLUX KLAN, INC., et als	)	CIVIL ACTION NO. 1718-N
DEFENDANTS	)	

MOTION TO BRING IN NEW PARTIES

Come now Defendants, Lester B. Sullivan, a commissioner of Public Safety of the City of Montgomery, Alabama, and Goodwin J. Ruppenthal, Chief of Police of the City of Montgomery, Alabama, and file this their motion for leave as third parties plaintiff to serve a summons and complaint upon the persons and organizations hereinbelow named, who are not parties to thá action, or in the alternative to add parties defendant and for leave to file a third party complaint against said persons and organizations which would request a preliminary injunction and a permanent injunction.

1. The movants herein file this motion under provision of Rule 14, FRCP.

2. Movants say that the Southern Christian Leadership Conference and Ralph D. Abernathy, individually and as an officer of said Conference, the Montgomery County Jail Council, and Ralph D. Abernathy, individually and as an officer of said Council, and the Student Nashville Non-Violent Association, and Patricia Jenkins, individually and as a member of officer of said Association, and the Congress of Racial Equality and ~~Ralph D. Abernathy,~~ individually and as an officer of said Congress are indispensable parties to the proceedings herein and their addition as parties is necessary for the complete disposition of this cause and is in the interest of justice.

3. Your movants allege and said allegations are more fully set out in the complaint attached hereto that the parties sought to be added hereby are interfering with the orderly processes of interstate commerce and are directly connected with and were instrumental parties in the matters and things which are subject of plaintiffs' claim and

before this Court and the trial of this cause.

WHEREFORE, your movants pray that this Court will make and direct an order allowing them to join the above organizations and persons as indispensable parties in this proceeding and further that they be allowed to file their complaint bringing in said parties as parties defendant hereto.

Attorney for Lester B. Sullivan, a commissioner of Public Safety of the City of Montgomery, Alabama, and Goodwin J. Ruppenthal, Chief of Police of the City of Montgomery, Alabama

UNITED STATES,	UNITED STATES DISTRICT COURT
PLAINTIFF	MIDDLE DISTRICT OF ALABAMA
VS.	NORTHERN DIVISION
U. S. KLANS, KNIGHTS OF THE KU KLUX KLAN, INC., et als	CIVIL ACTION NO. 1718-N
DEFENDANTS and THIRD PARTY PLAINTIFFS	
VS.	
SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, THE MONTGOMERY COUNTY JAIL COUNCIL, THE STUDENT NASHVILLE NON-VIOLENT ASSOCIATION, CONGRESS OF RACIAL EQUALITY, RALPH D. ABERNATHY, individually and as an officer or member of said organizations and PATRICIA JENKINS, individually and as an officer or member of said organizations,	
THIRD PARTY DEFENDANTS	

THIRD PARTY COMPLAINT

1. Plaintiff, United States, has filed against Defendants, U. S. Klans, Knights of the Ku Klux Klan, Inc., and others, including Lester B. Sullivan, Commissioner of Public Safety of the City of Montgomery, Alabama, and Goodwin J. Ruppenthal, Chief of Police of the City of Montgomery, Alabama, a complaint which is being heard before the Court at this time.

2. This complaint is filed under the provisions of Rule 14, FRCP.

3. The Court has jurisdiction of the parties and the subject matter of this complaint under the provisions of Title 18, USCA, Section 1951 and under the provisions of Title 28, USC, Section 1345.

4. The third party defendants herein are the Congress of Racial Equality, whose only known address is 38 Park Row, New York City, New York; Ralph D. Abernathy is a member of the advisory committee of said Congress; Defendant Southern Christian Leadership Conference is an unincorporated Conference which has or does business in Alabama; Ralph D. Abernathy is an officer or member of said Conference; Montgomery County Jail Council is an unincorporated Council in Montgomery, Alabama; Ralph D. Abernathy is an officer or member of said Council; the Student Nashville Non-Violent Association is an unincorporated Association, which

has or does business in Alabama; Patricia Jenkins is an officer or member of said Association.

5. Defendants Lester B. Sullivan and Goodwin J. Ruppenthal say that the above named third party defendants have in the past or are now interfering with the orderly processes of interstate commerce in this: that they are together and as separate organizations entering the State of Alabama and the City of Montgomery, Alabama, for the purpose of causing riot, dissention, disorderly conduct, and an interference with the police functions of the City of Montgomery; that they have announced their intentions of travelling in interstate commerce and to the City of Montgomery for the purpose of testing segregation in the City of Montgomery; that their announced intentions have been disseminated throughout the State of Alabama; that they have thereby undertaken to use the facilities of interstate commerce for the purpose of causing dissention and disturbances in the City of Montgomery and that unless they are restrained from travelling in interstate commerce for such purposes they will cause irreparable harm and injury to interstate commerce and the protection and enforcement of laws relating to interstate commerce.

WHEREFORE, Defendants Lester B. Sullivan and Goodwin J. Ruppenthal, pray that this Court will issue its process to the above named persons and organizations, and that upon a hearing herein, this Court will make and enter an order restraining said persons and organizations from using the channels of interstate commerce for the purpose of causing such riots, dissention and disturbances and that pending the hearing on this said complaint this Court will make and enter a temporary restraining order immediately restraining said persons and organizations from interfering with the orderly processes of interstate commerce and the peace and tranquility of the City of Montgomery.

Further, that this Court will issue a temporary restraining order and a preliminary injunction to the organizations known as the Congress of Racial Equality specifically enjoining it or its officers, agents, servants, employees or any persons or organizations acting in concert with them from interfering with interstate commerce or the orderly police processes of the City

of Montgomery, Alabama.

And Defendants, Lester B. Sullivan and Goodwin J. Ruppenthal further pray for such other, further and different relief as to the Court may seem meet.

/s/ Calvin M. Whitesell
Attorney for Lester B. Sullivan, Commissioner of Public Safety of Montgomery, Alabama, and Goodwin J. Ruppenthal, Chief of Police of Montgomery, Alabama, Third Party Plaintiffs.

STATE OF ALABAMA)
MONTGOMERY COUNTY)

BEFORE ME, Walter Knabe, the undersigned authority in and for said County and State, personally appeared Calvin M. Whitesell, who being known to me, stated under oath that he is the attorney for the Defendants, Lester B. Sullivan and Goodwin J. Ruppenthal, in this cause; that he has read the foregoing complaint and that the matters and things herein alleged are true as alleged therein except the matters and things averred on information and belief, which matters and things he truly believes to be true and therein alleged.

/s/ Calvin M. Whitesell

SWORN TO and SUBSCRIBED before me this _____ day of May, 1961.

/s/ Walter Knabe
Notary Public

Filed May 31, 1961
R.C. Dobson, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

RECEIVED
JUN 5 - 1961
UNITED STATES ATTORNEY
MIDDLE DISTRICT
OF ALABAMA

UNITED STATES,

Plaintiff,

vs.

U. S. KLANS, KNIGHTS OF THE KU KLUX KLAN, INC., a corporation; ALABAMA KNIGHTS, KNIGHTS OF THE KU KLUX KLAN, INC., a corporation; ALVIN HORN; ROBERT M. SHELTON; THURMAN E. COATS; CLAUDE V. HENLEY; LESTER B. SULLIVAN, Commissioner of Public Affairs of Montgomery; and GOODWIN J. ROTTENTHAL, Chief of Police of Montgomery,

Defendants.

CIVIL ACTION NO. 1718-N

FILED
JUN 2 1961
M. L. DOBSON
Clerk
By .....
Deputy Clerk

AMENDMENT TO ORDER

It appears to the Court that an error was made in the order of this Court entered on June 2, 1961, on page 5 thereof, wherein this Court found that "At 10:30 a.m., car No. 29 was sent * * *." The correct finding should have been as follows: "At 10:39 a.m., car No. 29 was sent * * *."

Upon consideration of the foregoing, it is ORDERED that this finding of fact be corrected to show "10:39 a.m." instead of "10:30 a.m."

Done, this the 2nd day of June, 1961.

/s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

in Alabama; and from committing acts of violence upon, or threatening, assaulting, intimidating or harassing passengers in interstate commerce in and through Alabama; and otherwise obstructing, impeding or interfering with the free movement of interstate commerce in and through the State of Alabama.

The submission of this matter was after notice to each of these

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

RECEIVED
JUN 5 - 1961
UNITED STATES ATTORNEY
MIDDLE DISTRICT
OF ALABAMA

UNITED STATES, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 1718-N
U. S. KLANS, KNIGHTS OF THE KU KLUX KLAN, INC., a corporation; ALABAMA KNIGHTS, KNIGHTS OF THE KU KLUX KLAN, INC., a corporation; ALVIN HORN; ROBERT M. SHELTON; THURMAN E. OURTS; CLAUDE V. HENLEY; LESTER B. SULLIVAN, Commissioner of Public Affairs of Montgomery; and GOODWIN J. RUPPENTHAL, Chief of Police of Montgomery, Defendants.	)	

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/s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE

DISTRICT OF ALABAMA, NORTHERN DIVISION

UNITED STATES, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 1718-N
U. S. KLANS, KNIGHTS OF THE KU KLUX KLAN, INC., a corporation; ALABAMA KNIGHTS, KNIGHTS OF THE KU KLUX KLAN, INC., a corporation; ALVIN HORN; ROBERT M. SHELTON; THURMAN E. OUZTS; CLAUDE V. HENLEY; LESTER B. SULLIVAN, Commissioner of Public Affairs of Montgomery; and GOODWIN J. RUPPENTHAL, Chief of Police of Montgomery, Defendants.	)	FILED JUN 2 1961 R. C. DOBSON Clerk By..... Deputy Clerk

O R D E R

This cause is now submitted upon the motion of the plaintiff, United States, seeking to have this Court grant a preliminary injunction, enjoining the defendants U. S. Klans, Knights of the Ku Klux Klan, Inc., a corporation; Alabama Knights, Knights of the Ku Klux Klan, Inc., a corporation; Federated Ku Klux Klan, Inc., an unincorporated association represented by Lester C. Hawkins; Alvin Horn, Robert M. Shelton, Lester C. Hawkins, Thurman E. Ouzts, and Claude V. Henley from interfering with the free flow of interstate commerce within the State of Alabama. This Court previously on May 20, 1961, issued a temporary restraining order enjoining and restraining U. S. Klans, Knights of the Ku Klux Klan, Inc., Alabama Knights, Knights of the Ku Klux Klan, Inc., Federated Ku Klux Klan, Inc., Alvin Horn, Robert Shelton, Lester C. Hawkins, and Thurman E. Ouzts, their officers, members, agents, employees, and all persons acting in concert with them, from conspiring to interfere with the travel of passengers in interstate commerce through and in Alabama; and from committing acts of violence upon, or threatening, assaulting, intimidating or harassing passengers in interstate commerce in and through Alabama; and otherwise obstructing, impeding or interfering with the free movement of interstate commerce in and through the State of Alabama.

The submission of this matter was after notice to each of these

defendants, and the submission is upon the evidence of several witnesses, both in person and by affidavit, and the several exhibits to the testimony of those witnesses. Having heard and understood the evidence, this Court now proceeds to make the appropriate findings of fact and conclusions of law.

This Court has jurisdiction of this matter and has jurisdiction over each of the above-named parties under the authority of Title 28, §§ 1345 and 1392(a), United States Code Annotated, this latter section providing, "Any civil action, not of a local nature, against defendants residing in different districts in the same state, may be brought in any of such districts." The several motions filed by the above-named defendants, seeking to have this action dismissed on the grounds that the Court does not have jurisdiction and that service of process was outside the territorial limits of this district, are due to be overruled and denied. A formal order of this Court will be entered accordingly.

From the evidence in this case, this Court specifically finds that the U. S. Klans, Knights of the Ku Klux Klan, Inc., is a corporation chartered under the laws of the State of Georgia, but doing business in the State of Alabama and within this district; that Alvin Horn is the chief officer and administrative head of that organization; that the Alabama Knights, Knights of the Ku Klux Klan, Inc., is a corporation chartered under the laws of Alabama and is doing business within the State of Alabama and within this district; that Robert M. Shelton is the chief officer and administrative head of that organization. This Court further finds that Lester B. Sullivan is Commissioner of Public Affairs of the City of Montgomery and, as such, is responsible for the general supervision and administration of the Montgomery Police Department and for maintaining the peace and enforcing the law within the City of Montgomery; that Goodwin J. Ruppenthal is the Chief of Police of the City of Montgomery and, as such, is responsible, under the direction of Sullivan, for the operation of the Montgomery Police Department and for preserving peace and enforcing the law within the City of Montgomery.

This Court further finds that in April of 1961 and continuing until the present time an organization known as the Congress of Racial

Equality, usually referred to as CORE, together with the Southern Christian Leadership Conference, the Student. Nashville Non-Violent Movement .. Fisk University, Nashville, Tennessee; Martin Luther King, Jr., of Montgomery, Alabama and Atlanta, Georgia; Ralph D. Abernathy of Montgomery, Alabama; Wyatt Walker, address unknown; F. L. Shuttlesworth of Birmingham, Alabama; and Solomon S. Seay, Sr., of Montgomery, Alabama, acting in concert with other individuals and organizations, formulated plans for sending groups of individuals of both the white and Negro races by interstate motor carrier through the State of Alabama, including this district. The announced purpose of said trips was for determining whether facilities of interstate commerce, including motor bus and terminal facilities in Anniston, Birmingham and Montgomery, Alabama, were being operated on a racially segregated basis and, if so, to demonstrate peaceably against such operation, and by such demonstrations, through the cooperation of the press, to focus national attention on such operation of the motor bus and terminal facilities in these cities.

This Court further finds that on or about May 14, 1961, a group of such individuals was traveling in interstate commerce toward Birmingham in two groups--one group in a Greyhound bus and the other group in a Trailways bus; that on May 14, 1961, certain individuals, some or all of whom were conspirators with or members of the U. S. Klans, Knights of the Ku Klux Klan, Inc., and the Alabama Knights, Knights of the Ku Klux Klan, Inc., by force, threats and violence, intimidated the passengers on one of the buses and destroyed the bus at or near Anniston, Alabama; that said intimidation of the passengers and destruction of this bus by said conspirators was in furtherance of the conspiracy to prevent the passengers on the bus from carrying out their announced and intended purposes. This Court further finds that on May 14, 1961, upon the arrival in Birmingham of the Trailways bus referred to above, the U. S. Klans, Knights of the Ku Klux Klan, Inc., certain of its members, the Alabama Knights, Knights of the Ku Klux Klan, Inc., certain of its members, and other conspirators, unlawfully beat, assaulted, intimidated, threatened and harassed certain of the passengers who had alighted from this bus at the Trailways bus terminal.

This Court further finds that on May 20, 1961, it was a matter of public knowledge in Montgomery, Alabama, and was known to the Montgomery Police Department in Montgomery, Alabama, that a Greyhound bus carrying a group of white and Negro college students (which students had announced the purpose of riding through the State of Alabama, including Montgomery, on an interstate carrier, to determine whether they could use the instrumentalities of interstate commerce on such trip without racial segregation, or other illegal discrimination, and to demonstrate against any such discrimination should it occur) was en route from Birmingham to Montgomery. This Court finds that the Montgomery, Alabama Police Department was advised, through Spencer Robb, an agent of the Federal Bureau of Investigation of Montgomery, Alabama, that the bus carrying these passengers had left Birmingham at approximately 8:30 a.m.; and that this advice was given Acting Chief Marvin Stanley of the Montgomery Police Department by this agent of the Federal Bureau of Investigation at approximately 9:30 a.m. on the morning of May 20, 1961. The Court further finds that the Montgomery Police Department was aware of the fact that this bus had left Birmingham and was aware of the fact that certain difficulties had been encountered in Birmingham, Alabama, on May 14, 1961, when a similar group had arrived in Birmingham, Alabama. This Court further finds that a Montgomery Police Department officer, Detective Shows, stated to a reporter for The Montgomery Advertiser on the morning of May 20 that the Montgomery police "would not lift a finger to protect" this group. The evidence is abundantly clear and this Court specifically finds that Lester B. Sullivan, as Police Commissioner, was advised by Floyd Mann, Director of the Alabama Department of Public Safety, on the morning of May 20, 1961, that the bus in which this group was riding was en route from Birmingham to Montgomery, Alabama, and had reached a point twelve to fourteen miles from the city limits of Montgomery, Alabama, at approximately 10:00 a.m. The likelihood of violence was known to the Department of Public Safety, and that Department, acting through its head, Floyd Mann, had taken the necessary precautions to protect this bus from Birmingham to the city limits of Montgomery, Alabama, by assigning sixteen highway patrol cars and one airplane to accompany this

bus from city limits to city limits. Through various sources, Sullivan and the Montgomery Police Department, through Sullivan, were aware of the explosive situation that existed in this area with reference to these riders, and with that knowledge did not take any of the usual precautionary measures to keep down violence in the City of Montgomery upon the arrival of this bus. Police Commissioner Sullivan, with this information--according to Police Officers Swindle, Moody, Lofton, Smith, Parham, and others--had not even alerted the Montgomery City Police Department on this morning of May 20 and no special plans had been made by the Montgomery City Police Department to ensure the safety of the group of students, to prevent unlawful acts of violence upon their persons, and to ensure the safe conduct of these groups of interstate travelers. This Court specifically finds that the Montgomery Police Department, under the direction of Sullivan and Ruppenthal (Acting Chief Stanley, upon behalf of Ruppenthal) willfully and deliberately failed to take measures to ensure the safety of the students and to prevent unlawful acts of violence upon their persons. This lack of protection on the part of the city police of Montgomery continued even after the arrival of the bus. From the testimony of witnesses and the radio log of the Police Department, no police car was dispatched to the area of violence until car No. 19 (with two officers) was sent at 10:33 a.m. "to investigate." At 10:37 a.m., car No. 25 was also sent to investigate. It is significant that none of the officers in these two cars testified in this case. At 10:30 a.m., car No. 29 was sent to the general area "to direct traffic." The police dispatcher's radio log does not reflect that any other help was sent by the dispatcher to the station until 11:24 a.m.

This Court further specifically finds that the U. S. Klans, Knights of the Ku Klux Klan, Inc., and the Alabama Knights, Knights of the Ku Klux Klan, Inc., through certain of their leaders and members, conspired to and did commit acts of violence upon these interstate student-passengers or damage to the buses in Anniston, Alabama, and in Birmingham, Alabama, on May 14, 1961, and in Montgomery, Alabama, on May 20, 1961. This Court further finds that the defendant Henley and the defendant Ouzts acted in concert with

the Klan groups herein named to commit acts of violence upon certain of the passengers and/or others in and around the passengers who had moved in interstate commerce and arrived at the Montgomery Greyhound bus terminal in Montgomery, Alabama, on May 20, 1961; that the actions of Henley and Ousts were of a threatening and intimidating nature; that they committed acts of violence upon either passengers or newsmen, or both, at or near the bus that had brought these students to Montgomery, Alabama; and that said acts of violence were committed by the said Henley and Ouzts for the purpose of interfering with the travel of passengers in interstate commerce through Alabama and for the purpose of obstructing, impeding and interfering with the free movement of interstate commerce in and through Alabama. This Court specifically finds that the actions of the U. S. Klans, Knights of the Ku Klux Klan, Inc., Alabama Knights, Knights of the Ku Klux Klan, Inc., Robert M. Shelton as chief officer and administrative head of the Alabama Knights, Knights of the Ku Klux Klan, Inc., and Alvin Horn as chief officer and administrative head of the U. S. Klans, Knights of the Ku Klux Klan, Inc., conspired and acted to interfere with the travel of passengers in interstate commerce on May 14 and May 20, 1961, and on said dates obstructed, impeded and interfered with the free movement of interstate commerce in and through the State of Alabama and in and through this district.

Pursuant to the above findings, this Court now concludes that this action is brought by the United States to protect the interests of citizens of the United States in the free and unobstructed movement of interstate commerce and in the exercise of the constitutional power of the United States over such commerce. This Court further concludes that the injury to the public that would possibly flow from this Court's denying this preliminary injunctive relief would be irreparable, and, further, that there will be no injury to the defendants if a preliminary injunction is issued.

The leading case on this question of the United States' being entitled to equitable relief against the unlawful obstruction of or interference with the free flow of interstate commerce is In re Debs, 158 U.S. 564, 586. The Supreme Court in that case concluded with a statement that

is particularly applicable to the situation this Court is now faced with:

> " * * * while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.
>
> "The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control."

See also Robbins v. United States, 284 F. 39; Perko v. United States, 204 F. 2d 446, and other cases therein cited.

The failure of the defendant law enforcement officers to enforce the law in this case clearly amounts to unlawful state action in violation of the Equal Protection Clause of the Fourteenth Amendment. The fact that this action was of a negative rather than an affirmative character is immaterial. Only recently the Supreme Court stated in Burton v. Wilmington Parking Authority, et al., 365 U.S. 715:

> "But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. * * * By its inaction * * * the State * * * has elected to place its power, property and prestige behind the admitted discrimination."

The willful and deliberate failure on the part of the law enforcement officers was also unlawful in that it deprived the student-passengers and other passengers of their rights without due process of law. It is a settled proposition that transportation of passengers in commerce and the right of a passenger to travel in commerce is a right of citizenship which cannot be deprived without due process of law under the Fifth Amendment to

the Constitution of the United States. See Kent v. Dulles, 357 U.S. 116.

This Court now further concludes that it is proper and necessary in this case to enter an order enjoining the U. S. Klans, Knights of the Ku Klux Klans, Inc.; Alabama Knights, Knights of the Ku Klux Klan, Inc.; Alvin Horn as the chief officer and administrative head of the U. S. Klans, Knights of the Ku Klux Klan, Inc.; Robert M. Shelton as the chief officer and administrative head of the Alabama Knights, Knights of the Ku Klux Klan, Inc.; Thurman E. Ouzts, Claude V. Henley, their agents, employees, officers, members, and all persons acting in concert with them from:

(1) Conspiring to interfere with the travel of passengers in interstate commerce through Alabama free from racial segregation and other unjust discrimination;

(2) Committing acts of violence upon, or threatening, intimidating, assaulting or harassing any passengers in interstate commerce in or through Alabama;

(3) Threatening, intimidating, committing acts of violence upon or injuring the persons or property of the Gulf Transport Company, Southeastern Stages, Inc., the Greyhound Corporation, their agents, officers, employees or drivers, on account of their carrying, attempting to carry or having carried passengers in interstate commerce without unjust discrimination; and

(4) Otherwise obstructing, impeding, or interfering with the free movement of interstate commerce in and through the State of Alabama.

This Court further concludes that it is appropriate and necessary in this case to enter an order enjoining Lester B. Sullivan as Commissioner of Public Affairs of the City of Montgomery and, as such, responsible for the general supervision and administration of the Montgomery Police Department and for maintaining the peace and enforcing the law within the City of Montgomery, and Goodwin J. Ruppenthal, Chief of Police of the City of Montgomery, their officers, agents, employees, and all those acting in concert with them, from failing or refusing to provide protection for all persons traveling in interstate commerce in and through the City of Montgomery, Alabama.

The defendants Sullivan and Ruppenthal have, through their attorneys of record, petitioned this Court orally and in writing to issue a

temporary restraining order against the Congress of Racial Equality, whose main address is 38 Park Row, New York City, New York, and which organization has done and is doing business in Alabama; the Southern Christian Leadership Conference, an unincorporated conference, which has done and is doing business in Alabama; Ralph D. Abernathy (a resident of this district), individually and as an officer in the Congress of Racial Equality and in the Southern Christian Leadership Conference; the Montgomery County Jail Council, an unincorporated council in Montgomery, Alabama; Ralph D. Abernathy as an officer and member of said council; the Student Nashville Non-Violent Movement, an unincorporated association of Nashville, Tennessee, which has and is doing business in Alabama and in this district; Martin Luther King, Jr., individually and as the president of the Southern Christian Leadership Conference; and Wyatt Tee Walker, individually and as the executive director of the Southern Christian Leadership Conference. In support of this petition to bring these individuals in this case and to issue a temporary restraining order against them, restraining them from using the various interstate commerce carriers in this State and in this district for the purpose of causing dissension and disturbances, which dissension and disturbances cause an undue burden and undue restraint on the free flow of commerce in this State and in this district, the testimony taken under oath before this Court in this hearing is offered. Petitioners specifically rely upon the testimony of two witnesses who are officials for the Greyhound Lines.

The carriers involved in this cause, Gulf Transport Company, Southeastern Stages, and the Greyhound Corporation, having been authorized by the Interstate Commerce Act and by the terms of their certificates from the Interstate Commerce Commission, are required to provide safe and adequate service, equipment and facilities for the transportation of passengers in and through the State of Alabama. The bus terminals and the terminal facilities in Montgomery, Birmingham and Anniston are an integral and regular part of the interstate transportation provided and required to be provided by these companies.

As has already been observed by this Court, the actions of the

several defendants in the use of violence, force, threats, intimidations and harassment operate to impede the movement of passengers during the course of interstate bus journeys. These actions forcibly obstruct and impede interstate commerce, and such actions are due to be halted.

Those who sponsor, finance and encourage groups to come into this area with the knowledge that such publicized trips will foment violence in and around the bus terminals and bus facilities are just as effective in causing an obstruction to the movement of bona fide interstate bus passengers as are those defendants named in the Government's complaint. This Court now specifically finds that the so-called "Freedom Riders" and other like groups have been and are being sponsored, financed, and assisted in their actions by representatives and members in this area of the Congress of Racial Equality (CORE); the Southern Christian Leadership Conference; Ralph D. Abernathy, individually and as an officer in the Congress of Racial Equality and in the Southern Christian Leadership Conference; the Montgomery County Jail Council, and Ralph D. Abernathy as an officer and member of said council; the Student Nashville Non-Violent Movement; Martin Luther King, Jr., individually and as the president of the Southern Christian Leadership Conference; Wyatt Tee Walker, individually and as the executive director of the Southern Christian Leadership Conference; and representatives and other members of the organization called Southern Christian Leadership Conference who also reside or engage in activities in this district and State. This Court recognizes that this sponsorship, even though it is agitation within the law of the United States, is agitation that constitutes an undue burden upon the free flow of interstate commerce at this particular time and under the circumstances that exist in this State and district; for instance, the making of unnecessary additional facilities and buses available for these non-bona fide interstate trips, requiring the carriers to run extra schedules, and coordinating these schedules with armed escorts.

The fact that this agitation on the part of the members and representatives of the Congress of Racial Equality, the Southern Christian Leadership Conference, and the others named, is within the law of the United

States and is activity that may be one of the legal rights belonging to these individuals as citizens of the United States, the right of the public to be protected from the evils of their conduct is a greater and more important right. As the Supreme Court of the United States so aptly put it in American Communications Assn. v. Douds, 339 U.S. 382:

> "And Government's obligation to provide an efficient public service, United Public Workers v. Mitchell, 330 U.S. 75 (1947), and its interest in the character of members of the bar, In re Summers, 325 U.S. 561 (1945), sometimes admit of limitations upon rights set out in the First Amendment. And see Giboney v. Empire Storage Co., 336 U.S. 490, 499-501 (1949). We have never held that such freedoms are absolute. The reason is plain. As Mr. Chief Justice Hughes put it, 'Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.' Cox v. New Hampshire, supra at 574."

The activity of the Congress of Racial Equality representatives and those acting in concert with them in this district and within this State, the activity of the Southern Christian Leadership Conference representatives and those acting in concert with them in this district and within this State, the Student Nashville Non-Violent Movement and those acting in concert with them, individuals F. L. Shuttlesworth, Ralph D. Abernathy, Solomon S. Seay, Sr., Martin Luther King, Jr., Wyatt Tee Walker, and those acting in concert with these individuals in sponsoring, encouraging, assisting and publicizing the so-called "Freedom Riders," or other like groups who are presently engaged in "agitating within the law," is just as effectively causing an undue burden and restraint upon the free flow of interstate commerce in this State and district as is the activity of the other defendants in this case. ALL are due to be enjoined and/or restrained from such further activities that produce this evil result.

Even though these sponsors have not been named as defendants in this action by the United States, this Court is under a duty, in granting the relief sought by the United States, to go further in this particular case and grant the public complete relief insofar as possible.

It is well settled that a district court of the United States,

sitting as a court of equity, has inherent power to grant complete relief in the matter before it in controversy. As the Supreme Court of the United States said in Porter v. Warner Co., 328 U.S. 395:

> "Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction."

The Court further said that if the public interest is involved in a proceeding those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. As the Court went on to say:

> "Power is thereby resident in the District Court, in exercising this jurisdiction, 'to do equity and to mould each decree to the necessities of the particular case.' Hecht Co. v. Bowles, 321 U.S. 321, 329. It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice. Camp v. Boyd, 229 U.S. 530, 551-552." (Emphasis added.)

As observed above, the rights of the public to be protected from evils of conduct, even though the constitutional rights of certain persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by the courts of the United States. As the Supreme Court said in American Communications Assn. v. Douds, supra:

> " * * * We have noted that the blaring sound truck invades the privacy of the home and may drown out others who wish to be heard. Kovacs v. Cooper, 336 U.S. 77 (1949). The unauthorized parade through city streets by a religious or political group disrupts traffic and may prevent the discharge of the most essential obligations of local government. Cox v. New Hampshire, 312 U.S. 569, 574 (1941). The exercise of particular First Amendment rights may fly in the face of the public interest in the health of children, Prince v. Massachusetts, 321 U.S. 158 (1944), or of the whole community, Jacobson v. Massachusetts, 197 U.S. 11 (1905), and it may be offensive to the moral standards of the community, Reynolds v. United States, 98 U.S. 145 (1878); Davis v. Beason, 133 U.S. 333 (1890)."

This is not a restraining order enjoining individuals or groups who are traveling in interstate commerce through Alabama and through this district on bona fide trips. It is only directed to and against those organizations and individuals specifically named, or other like organizations or individuals acting in concert with them or acting as their agents or attorneys, that have been and are engaged in assisting, encouraging, financing and sponsoring groups and/or individuals in traveling in interstate commerce for the specific and announced purpose of testing and demonstrating. Such action has caused and is causing an undue burden and restraint on interstate commerce, resulting here in this State in the past few weeks in disrupting schedules of interstate carriers and causing bona fide interstate passengers to be subjected to violence, threats, intimidation and general inconvenience. While it is true that this violence is caused directly by the Klan groups and others acting in concert with them, and has been allowed by the willful failure of the police authorities to take the usual adequate, protective measures, it is equally true that the Congress of Racial Equality, the Southern Christian Leadership Conference, Ralph D. Abernathy, F. L. Shuttlesworth, Martin Luther King, Jr., and others acting in concert with them, by their actions in financing and sponsoring and aiding and assisting such non-bona fide trips are directly causing an undue burden and restraint upon interstate commerce within the State of Alabama and within this district.

This Court recognizes that the threat of mob violence is no excuse for the failure of the Court to issue an injunction to protect the constitutional rights of private citizens. Cooper v. Aaron, 1958, 358 U.S. 1. However, that principle is not applicable in this case, since here the Court is issuing the injunction prayed for by the United States; however, as the Court has already observed, the granting of the injunction sought by the United States will only partly relieve the burden and restraint on interstate commerce within the State and this district.

The Cooper v. Aaron case is also not applicable here, since in that case the district court, in following Brown v. Board of Education, 349 U.S. 294, had issued direct orders that certain students be admitted

to attend a designated school. In that case the mob violence was directly traceable to State action on the part of State officials in resistance to the Brown decision. In this district, this Court has already been called upon to decide some of the very constitutional rights these individuals traveling in interstate commerce seek to enjoy. Since a class suit has recently been filed asking this Court to determine plaintiffs' constitutional rights in this respect, continued testing of these laws or customs during the time this suit is pending in this Court can only serve to frustrate this pending litigation. This Court also recognizes the principle announced by the district court in Bush v. Orleans Parish School Board, 1960, 188 F. Supp. 916. The constitutional right in that case, as observed by the Court, had been granted by Brown v. Board of Education more than six years before the Court was faced with the situation that local conditions made compliance difficult. In this case, the constitutional right plaintiffs seek to invoke was only made definite by court decision last fall in Boynton v. Virginia, 364 U.S. 454. It has not yet been determined whether the local bus terminals fall within that classification that existed in the Boynton case.

In accordance with the foregoing, the preliminary injunction prayed for by the United States is due to be granted against U. S. Klans, Knights of the Ku Klux Klan, Inc., a corporation; Alabama Knights, Knights of the Ku Klux Klan, Inc., a corporation; Alvin Horn; Robert M. Shelton; Thurman E. Ouzts; Claude V. Henley; Lester B. Sullivan, Commissioner of Public Affairs of Montgomery; and Goodwin J. Ruppenthal, Chief of Police of Montgomery, their officers, agents, employees, members, and all persons acting in concert with them.

In accordance with the foregoing, a temporary restraining order, as authorized and provided by Rule 65 of the Federal Rules of Civil Procedure and as prayed for by part of the defendants in this action, is due to be issued to prevent immediate and irreparable injury to the free flow of interstate commerce within this State and within this district, against the following: Congress of Racial Equality, Southern Christian Leadership Conference; Ralph D. Abernathy, individually and as an officer in

the Congress of Racial Equality and as an officer in the Southern Christian Leadership Conference; the Montgomery City Jail Council and Ralph D. Abernathy as an officer and member of said council; the Student Nashville Non-Violent Movement; Martin Luther King, Jr., individually and as the president of the Southern Christian Leadership Conference; Wyatt Tee Walker individually and as the executive director of the Southern Christian Leadership Conference, F. L. Shuttlesworth and Solomon S. Seay, Sr., individually and as officers in one or more of the above-named organizations, and all others acting as their agents, officers, or members in or employees of, or acting in concert with them.

This Court is of the further conclusion and it is ORDERED that this cause be and the same is hereby amended to include as defendants each of the above-named individuals and organizations against whom the temporary restraining order is being issued.

This Court is of the further conclusion and it is ORDERED that the Honorable Hartwell Davis, United States Attorney for the Middle District of Alabama, and such other representative or representatives of the United States Department of Justice as may be designated by the Attorney General for the United States, be and each is hereby designated and appointed to present the evidence as amicus curiae at the hearing for a preliminary injunction, said hearing to be for the purpose of determining whether a preliminary injunction should issue, pending a trial on the merits against each of the individuals and organizations against whom this restraining order is being issued.

The United States Marshal for this district is ORDERED and DIRECTED to serve a copy of these findings, conclusions and order and a copy of the formal preliminary injunction and a copy of the formal temporary restraining order upon each of the defendants in this action against whom the preliminary injunction is being issued and upon each of the defendants against whom the temporary restraining order is being issued.

Done, this the 2nd day of June, 1961.

FRANK M. JOHNSON, JR.

UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE

DISTRICT OF ALABAMA, NORTHERN DIVISION

UNITED STATES, Plaintiff, vs. U. S. KLANS, KNIGHTS OF THE KU KLUX KLAN, INC., a corporation; ALABAMA KNIGHTS, KNIGHTS OF THE KU KLUX KLAN, INC., a corporation; ALVIN HORN; ROBERT M. SHELTON; THURMAN E. OUZTS; CLAUDE V. HENLEY, LESTER B. SULLIVAN, Commissioner of Public Affairs of Montgomery; GOODWIN J. RUPPENTHAL, Chief of Police of Montgomery; CONGRESS OF RACIAL EQUALITY, SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, MONTGOMERY COUNTY JAIL COUNCIL, STUDENT NASHVILLE NON-VIOLENT MOVEMENT, an unincorporated association, F. L. SHUTTLESWORTH, MARTIN LUTHER KING, JR., SOLOMON S. SEAY, SR., RALPH D. ABERNATHY, and WYATT TEE WALKER, Defendants.	)	CIVIL ACTION NO. 1718-N FILED JUN 2 1961 R. C. DOBSON Clerk By..... Deputy Clerk

TEMPORARY RESTRAINING ORDER

For the reasons stated by the Court in its order made and entered this date in this cause, the organizations and individuals hereinafter named have caused and are causing irreparable injury to the United States and to the public, consisting of the obstruction of and interference with the movement of interstate commerce, all before notice can be served and a hearing had:

NOW, THEREFORE, IT IS THE ORDER, JUDGMENT AND DECREE OF THIS COURT that:

1. Congress of Racial Equality (CORE),

2. Southern Christian Leadership Conference,

3. Montgomery County Jail Council,

4. Student Nashville Non-Violent Movement, an unincorporated association,

5. F. L. Shuttlesworth,

6. Martin Luther King, Jr.,

7. Solomon S. Seay, Sr.,

8. Ralph D. Abernathy, and

9. Wyatt Tee Walker,

their officers, members, agents, employees and all persons acting in concert with them, be and each is hereby temporarily restrained from:

(a) Sponsoring, financing, assisting or encouraging any individual or group of individuals in traveling in interstate commerce through or in Alabama for the purpose of testing the State or local laws as those laws relate to racial segregation;

(b) Committing any act that is designed to cause violence upon, or threats towards any passengers in interstate commerce in and through Alabama; and

(c) Otherwise obstructing, impeding or interfering with the free movement of interstate commerce--in the transportation of bona fide interstate passengers in and through the State of Alabama.

It is further ORDERED that each of the defendants hereinabove named appear before this Court in the United States District Courthouse, Montgomery, Alabama, on the 12th day of June, 1961, at 10:00 a.m., to show cause, if any he has, why a preliminary injunction should not be issued pending a trial on the merits.

Done, this the 2nd day of June, 1961, at 10:00 a.m.

FRANK M. JOHNSON, JR.

UNITED STATES DISTRICT JUDGE

DK - 6/5/61

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

----------X

UNITED STATES,

Plaintiff,

vs.

U. S. KLANS, KNIGHTS OF THE KU KLUX KLAN, INC., et als,

CIVIL ACTION

NO.1718-N

Defendants and
Third Party Plaintiffs

vs.

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, THE MONTGOMERY COUNTY JAIL COUNCIL, THE STUDENT NASHVILLE NON-VIOLENT ASSOCIATION, CONGRESS OF RACIAL EQUALITY, RALPH D. ABERNATHY, individually and as an officer or member of said organizations and PATRICIA JENKINS, individually and as an officer or member of said organizations,

Third Party Defendants.

----------X

MEMORANDUM ON BEHALF OF THIRD PARTY DEFENDANTS, CONGRESS OF RACIAL EQUALITY and RALPH D. ABERNATHY, IN OPPOSITION TO THE ISSUANCE OF A PRELIMINARY INJUNCTION AGAINST THEM

STATEMENT

The organization, CONGRESS OF RACIAL EQUALITY, hereinafter referred to as CORE, and its officers, agents, servants and/or employees, and RALPH D. ABERNATHY, individually and as a member of that organization, have been

named as third party defendants in the third party complaint of defendants, Lester B. Sullivan and Goodwin J. Ruppenthal. The said defendants and third party plaintiffs sought a temporary restraining order against these defendants. Pending the hearing upon the issuance of a temporary injunction, the said third party defendants are restrained from certain conduct,as described in the temporary restraining order issued by this Court on June 2nd, 1961.

This memorandum is submitted in opposition to the granting of any injunction against the third party defendants which restrain them from engaging in lawful and constitutionally protected activity.

FACTS

The Court, in its statement of the factual history of this case, set forth in detail the events leading to the issuance of the temporary injunction against the defendants and the restraining order against the third party defendants here. Very briefly, the Court found that the third party defendants, along with others, were travelling in regular commercial busses which operated in interstate commerce through the State of Alabama. That by reason of the conduct of certain of the defendants, acts of violence were threatened and actually took place in Montgomery, Alabama on May 20th, 1961.

The Court further found that the police and other City Officials of that City deliberately refrained from providing protection to the said group of interstate travellers. The Court found further that CORE and the other third party defendants had sponsored and aided the trip of the individuals travelling in interstate commerce for the express purpose of determining whether they could use the instrumentalities of interstate commerce without racial segregation or other illegal discrimination.

The Court, in summary, found that the third party defendants were lawfully travelling in interstate commerce, that the U. S. Klans and other of the defendants committed acts of violence upon the interstate passengers and that the City Officials of Montgomery, Alabama deliberately failed to take measures to insure the safety of the travellers.

POINT I

THE COURT ERRED IN RESTRAINING TRAVEL IN INTERSTATE COMMERCE

The Court very properly found that the national government is charged with the duty of keeping the highways of interstate commerce free from obstruction. The importance of the power of Congress to regulate commerce has never been more clearly recognized than it was in the earliest analysis of the power by the Supreme Court. In the

landmark decision in Brown v. Maryland, 12 Wheat 419, Mr. Chief Justice Marshall stated:

> "The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated for foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore matter of surprise that the grant should be as extensive as the michief, and should comprehend all foreign commerce, and all commerce among the states. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity."

Refinements have been added, legislation has been drawn, but the basic concept contained in the statement quoted above has never been altered. Reference to its language will demonstrate the flaw in the Court's reasoning in restraining the third party defendants from their right to travel. For the Court said there "to construe the power so as to impair its efficacy": The facts clearly demonstrate that the acts of the defendants caused an obstruction of

interstate commerce. Such conduct can, of course, not be tolerated at law, but to so construe the travel itself as to suggest that the very act constitutes obstruction is to permit and perpetuate such impairment or obstruction. Analysis of the facts makes clear that the plaintiff, the United States Government, was correct in naming those defendants who actually committed obstruction of commerce; that it did so clearly in order to meet its responsibilities to maintain free commerce among the several states. It was correct also in omitting the travellers as defendants. The Government recognized what the Court apparently did not, that the act of travel cannot be construed in this instance as obstruction, that only the acts, the purpose of which is to prevent travel, can be so described. The unlawful acts of the defendants cannot convert lawful conduct on the part of the third party defendants into unlawful conduct. To so hold would be to give license and support to lawbreakers. For the Court in enjoining the third party defendants has achieved what the defendants hoped to be able to accomplish, the prevention of the lawful acts of third party defendants in travelling in interstate commerce.

POINT II

THE RIGHT OF FREEDOM OF TRAVEL IS CONSTITUTIONALLY PROTECTED AND MAY NOT BE ENJOINED WITHOUT DUE PROCESS OF LAW

The Court acknowledges that the transportation of passengers in commerce and the right of a passenger to travel in commerce is a right of citizenship, which cannot be deprived without due process of law under the Fifth Amendment to the Constitution of the United States.

Kent v. Dulles, 357 U. S. 116

Recognizing, however, that the third party defendants by travelling in interstate commerce were so exercising constitutional right, the Court in an apparent effort to justify its restraint on such right adopted the use of the word "agitation" to describe the acts of travel. Perhaps this is the area where the Court most seriously erred. To examine a course of conduct such as that pursued by third party defendants herein, that is, peaceful and lawful travel in interstate busses and to characterize it as anything other than lawful travel, is an effort at converting a lawful act to one that is something else. The Court itself had difficulty with this description, for it said:

> "***even though it is agitation within the law of the United States, is agitation that constitutes a undue burden upon the free flow of interstate commerce* * *".

First, it is argued that the descriptive is inaccurate. Travel is travel and not agitation. Second, even assuming that travel could be found to have qualities apart from the mere passage from one place to another, in the same way, for example, that the act of picketing has been called speech and something more (see Building Service Employees' Union v. Gazzam, 339 U. S. 532), that something more would still be protected activity. If the third party defendants here were in fact using the act of travel for the purpose of communication, the act of and the end of that communication are lawful. For as the Court itself acknowledged, the announced purpose of the trip was to determine whether certain facilities of interstate commerce "were being operated on a racially segregated basis and, if so, to demonstrate peaceably against such operation, and by such demonstrations, through the cooperation of the press, to focus national attention on such operation of the motor bus and terminal facilities in these cities."

Thus, the additional factor which the Court appears to find in travel, is a form of communication, a communication to the public at large that the rights of individuals in interstate commerce were impaired or infringed in parts of the United States. The communication of such ideas is also protected conduct. If it is described as a form of speech, then there can be no doubt of its protection

under the First Amendment of the Constitution. The Court cannot properly convert the exercise of the rights of the third party defendants here, that is, the right to travel between states or the right to communicate into illegal acts. What has focused attention upon these acts is the misconduct of the defendants in attempting to prevent their exercise. The Court itself has pointed out that violence or threats of violence do not justify the use of police power to deprive citizens of their constitutional rights.

Cooper v. Aaron, 358 U. S. 1

In its citation of that case, however, the Court, it is submitted, incorrectly applied its rule. The Court held that the principle enunciated that the threat of mob violence is no excuse for the failure of the Court to issue an injunction to protect the constitutional right of private citizens is not applicable to the facts in this case. The Court reasoned that it was issuing the injunction prayed for by the United States, but that that injunction would only partly relieve the burden upon interstate commerce.

First, it is questioned whether or not that is an accurate stqtement. If, in fact, those who threatened and committed violence are restrained from doing so, then the burden upon interstate commerce which gave rise to this cause would be eliminated. Equally true is

the fact that if the law enforcement authorities properly acted to prevent such violence, commerce would be protected. Secondly, even if such injunction were not sufficient, it would be improper to permit violence or threats of violence to be the determinant. To do so would be to acknowledge that our Government is incapable of protecting its citizens and of offering them guarantees of protection in the exercise of their rights as citizens.

CONCLUSION

For all of the reasons set forth herein, it is respectfully submitted that the restraining order against the third party defendants be vacated and that the injunction pendente lite sought against them be denied.

Respectfully submitted,

THIRD-PARTY SUMMONS IN A CIVIL ACTION — D. C. Form No. 46 Revised

United States District Court

FOR THE

MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

CIVIL ACTION FILE NO. 1718-N

UNITED STATES

Plaintiff

v.

U. S. KLANS, KNIGHTS OF THE KU KLUX KLAN, INC., ET ALS.

Defendant and Third-party Plaintiff

v.

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, THE MONTGOMERY COUNTY JAIL COUNCIL, THE STUDENT NASHVILLE NON-VIOLENT ASSOCIATION, CONGRESS OF RACIAL EQUALITY, RALPH D. ABERNATHY, individually and as an officer or member of said organizations and PATRICIA JENKINS, individually and as an officer or member of said organizations,

Third-party Defendant

SUMMONS

To the above-named Third-party Defendant:

You are hereby summoned and required to serve upon

plaintiff's attorney, whose address Hartwell Davis, United States Attorney, is Post Office Building, Montgomery, Alabama

and upon Calvin M. Whitesell

who is attorney for the above-named defendant and third-party plaintiff, and whose address is Bell Building, Montgomery, Alabama

an answer to the third-party complaint which is herewith served upon you and an answer to the complaint of the plaintiff, a copy of which is herewith served upon you, within Twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint.

R. C. Dobson

Clerk of the Court.

By J. M. Buttery

Deputy Clerk.

Date: June 2, 1961

[Seal of Court]

NOTE.—This summons is issued pursuant to Rule 14 of the Federal Rules of Civil Procedure.

SUMMONS IN A CIVIL ACTION D. C. Form No. 45a Rev. (1-49)

United States District Court

FOR THE

MIDDLE DISTRICT OF ALABAMA

Room 224 DIVISION

CIVIL ACTION FILE NO. 1718-N

UNITED STATES

Plaintiff

v.

U. S. KLANS, et al.

and

CONGRESS OF RACIAL EQUALITY, an unincorporated association,

Defendant

SUMMONS IN CIVIL ACTION

Returnable not later than days after service.

SUMMONS

Attorney for Plaintiff.

FDI—JK—6-23-23—160M—30

To the above-named Defendant to the above-named Defendant, Congress of Racial Equality, an unincorporated association

You are hereby summoned and required to serve upon Calvin Whitesell, Amicua Curiae Exit Building, Montgomery, Alabama, and Hartwell Davis, United States Attorney, Plaintiff's Attorney, P. O. Box 197, Montgomery, Alabama, plaintiff's attorney , whose address

an answer to the complaint which is herewith served upon you, within Twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

R. C. Dobson

Clerk of Court.

Annie Schooler

Deputy Clerk.

June 12, 1961.

Date: [Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE

DISTRICT OF ALABAMA, NORTHERN DIVISION

UNITED STATES,

Plaintiff,

vs.

U. S. KLANS, KNIGHTS OF THE KU KLUX KLAN, INC., a Corporation, ALABAMA KNIGHTS, KNIGHTS OF THE KU KLUX KLAN, INC., a Corporation; FEDERATED KU KLUX KLAN, INC., an unincorporated association represented by Lester C. Hawkins; ALVIN HORN; ROBERT M. SHELTON; LESTER C. HAWKINS; THURMAN E. OUZTS; CLAUDE V. HENLEY; EUGENE T. CONNOR, Commissioner of Public Safety of Birmingham; JAMIE MOORE, Chief of Police of Birmingham; LESTER B. SULLIVAN, Commissioner of Public Affairs of Montgomery; GOODWIN J. RUPPENTHAL, Chief of Police of Montgomery; CONGRESS OF RACIAL EQUALITY, SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, F. L. SHUTTLESWORTH, MARTIN LUTHER KING, JR., SOLOMON S. SEAY, SR., RALPH D. ABERNATHY, and WYATT TEE WALKER,

Defendants.

CIVIL ACTION NO. 1718-N

FILED

AUG 11 1961

R. C. DOBSON
Clerk

By.....
Deputy Clerk

O R D E R

This cause is now submitted upon the motion of Calvin M. Whitesell, filed in his capacity as amicus curiae by virtue of appointment by this Court on June 8, 1961, wherein the said Calvin M. Whitesell moves this Court to "withdraw the request for a preliminary injunction in this cause" against the Congress of Racial Equality, Southern Christian Leadership Conference, F. L. Shuttlesworth, Martin Luther King, Jr., Solomon S. Seay, Sr., Ralph D. Abernathy, and Wyatt Tee Walker.

Upon consideration of said motion and for good cause, it is the ORDER, JUDGMENT and DECREE of this Court that the motion of Calvin M. Whitesell as amicus curiae, made and filed herein on August 4, 1961, seeking leave of this Court to withdraw the request for a preliminary injunction against the Congress of Racial Equality, Southern Christian Leadership Conference, F. L. Shuttlesworth, Martin Luther King, Jr., Solomon S. Seay, Sr., Ralph D. Abernathy, and Wyatt Tee Walker, be and the same is hereby granted.

It is the further ORDER, JUDGMENT and DECREE of this Court that this cause be and the same is hereby dismissed as to the Congress of Racial

Equality, Southern Christian Leadership Conference, F. L. Shuttlesworth, Martin Luther King, Jr., Solomon S. Seay, Sr., Ralph D. Abernathy, and Wyatt Tee Walker.

Done, this the 11th day of August, 1961.

/s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

Montgomery Advertiser – June 12, 1961

Jackson Lists 110 Arrests During 'Rides'

JACKSON, Miss., (AP) — Police arrested six more "Freedom Riders" here Sunday swelling the number of travelers taken into custody in Jackson to 110.

There were no crowds and no violence.

A group of five white men and one white woman — all from Minnesota — got off a Greyhound bus from Nashville, Tenn., and walked into a Negro waiting room.

Police Capt. J. L. Ray told the group to move on. They made no reply.

"Did you understand that I said you'll have to move out of the station," Capt. Ray asked. They looked at him but did not answer.

He placed the five under arrest. As police took their names, a sixth rider approached carrying a guitar case and handbag.

ASKED TO MOVE

Ray asked him to move on, too. When he refused, police arrested him, too.

Police identified the riders as follows:

Claire O'Connor, 22, 1249 Gibbs Ave., St. Paul, Minn., native of Boston, University of Minnesota.

Marvin Allen Davidov, 20, 1405 5th St. SE, Minneapolis, Minn., art dealer, native of Detroit.

Zev Aelony, 23, 4350 Garfield St. Minneapolis, Minn., University of Minnesota, native of Palo Alto, Calif.

David Kerr Morton, 21, Jackson, Wyoming, writer, native of Salt Lake City, Utah.

Eugene John Uphoff, 19, 1521 7th St. SE, Minneapolis, Minn., University of Minnesota, native of Madison, Wis.

Robert M. Baum, 19, 18916 Kingswood Terrace, Excelsior, Minn., University of Minnesota, native of Orange, N.J.

The police said Uphoff identified himself as the son of a professor of economics and labor relations at the University of Minnesota.

'Freedom Rider' Injunction Facing Court Hearing Today

A hearing on whether a permanent injunction will be issued against "Freedom Ride" sponsors is set for Monday.

Papers filed Saturday for integrationist groups in reply to a federal court order prohibiting them from sponsoring "Freedom Rides" into Alabama used generally the same arguments set out in their unsuccessful attempt to get an earlier order set aside last Friday.

They contended that the riders were merely exercising constitutional rights.

The court on June 2 issued a temporary restraining order directing Montgomery Police to protect "Freedom Riders" and prohibiting Ku Klux Klan groups and four individuals from doing violence to interstate bus travelers. And, at the request of counsel for the police, the court also prohibited sponsored "Freedom Riders" or sponsorship of such rides in Alabama.

U.S. Dist. Judge Frank M. Johnson Jr. Friday denied arguments by lawyers for the Congress of Racial Equality (CORE) and other groups testing bus and bus station integration that the temporary restraining order should be set aside.

In New York, CORE announced that Carl Rachlin, general counsel of CORE, will represent the organization when it seeks dismissal of the order.

Thurgood Marshall, chief attorney for the National Association for the Advancement of Colored People, was one of four attorneys signing the papers, filed in U.S. District Court Saturday, but court clerk Hugh Maddox said Marshall did not sign as counsel for the NAACP.

Easiest Travel on Earth—Air Conditioned. Fast schedules. Rest Room Aboard, on Trailways. Ph. 264-5326.

Montgomery Advertiser June 12, 1961

July 17 Date Set By Court

Alabama Journal June 12, 1961

A scheduled injunction hearing against sponsors of "freedom" bus rides in Alabama was postponed today until July 17.

U. S. Dist. Judge Frank M. Johnson continued the hearing because the Congress of Racial Equality (CORE) and the other organizations previously put under a temporary restraining order were not formally served with notice of the original Justice Department complaint which led indirectly to the freedom rider order.

The Justice Department did not ask for the action against CORE and the other groups; in fact, it opposed it.

But Johnson's restraining order prohibiting organized or sponsored bus station segregation tests in Alabama came along with an injunction against Montgomery police, the Ku Klux Klan and four individuals.

'RIDERS'

(Continued From Page 1)

riders who will leave the capital later this week for points in the South.

CORE spokesmen said a biracial group of about 30 riders would make the trip.

Six more "freedom riders," all of them white and led by a blonde coed, were arrested Sunday in Jackson, Miss., when they tried to obtain service at a lunch counter in the "colored" waiting room of the Greyhound bus terminal.

Their arrests brought to 110 the number of riders taken into custody in Jackson at bus, train and plane terminals since May 24. About 84 riders were still in jail, refusing to pay fines on breach of the peace charges.

The group had arrived from Nashville, Tenn., the jumping off point for rides into Mississippi since they were banned in Alabama. Four members of the group are students at the University of Minnesota.

They were led by Claire O'Conner, 22, St. Paul, Minn., the only girl in the group. She and four others tried to order food at the Negro lunch counter and were arrested.

ONE HAS GUITAR

Later, Eugene John Uphoff, 19, of Minneapolis, walked into the waiting room struggling with a guitar. He conceded he was with the "freedom riders" and was also jailed.

The others were identified as Marvin Allen Dadidow, 29, Minneapolis; Robert M. Baun, 19, Excelsior, Minn.; David Kerr Morton, 21, Jackson, Wyo.; and Zev Alcony, 23, Minneapolis.

Uphoff told police he brought along the guitar to "while away" his time in jail. Officers confiscated it under a policy of allowing no metal objects in cells.

CAREY SPEAKS OUT

Electrical Workers Union president James B. Carey told a mass biracial rally in Washington Sunday business and industry were "the real and final enemies" of "freedom riders."

Carey, secretary-treasurer of the AFL-CIO Industrial Union Department, urged "big business and industry lobbies" to stop supporting Alabama Gov. John Patterson and Gov. Ross Barnett of Mississippi.

He said organized labor, "with exceedingly tiny exceptions," backs the movement. But he told the rally "not one word of protest . . . has come from the National Association of Manufacturers or the U. S. Chamber of Commerce. . . ." Carey was referring to the rioting which occurred last month in Alabama and the mass arrests of riders in Mississippi.

Barnett said he was "too busy with other things" to comment on Carey' remarks and another in which the union leader said Barnett's career depended upon racial segregation.

"I had about 40 planks in my platform," Barnett said in Jackson, "Segregation was just one of them."

JOHNSON RULES TODAY

Alabama Journal 6/12/61

New Anti-Mixing Attack In Offing

By UP INTERNATIONAL

Supporters of the "freedom rider" movement sought today on several fronts to breathe new life into the attack on Deep South segregation laws involving interstate travelers.

A federal judge in Montgomery, Ala., was expected to rule on a motion asking that an order barring "freedom rides" in the state be lifted.

Judge Frank M. Johnson Jr., who issued the original decree last month, will listen to arguments by anti-segregation organizations who claim "Freedom Riders" are merely exercising their constitutional rights and should not be barred from Alabama.

In Washington, the Congress of Racial Equality (CORE) scheduled a news conference to announce the itinerary of more

(See "RIDERS," Pg. 2-A)

PHONE SP 5-1737

P. O. BOX 802

LAW OFFICES
ERNEST A. FINNEY, JR.
16½ WEST LIBERTY STREET
SUMTER, S. C.

May 16, 1961

Mr. Carl Rachlin
Vladeck and Elias
Counsellors At Law
280 Broadway
New York 7, New York

Dear Sir:

Enclosed you will please find transcripts, records and Notice of Intention to Appeal and Exception in several cases (listed on the attached sheet) which we intend to discuss with you when we come to New York next month.

My present plans call for me to be in New York from the 8th to the 13th of June to have detailed discussions with you concerning all cases in which the Congress of Racial Equality is interested and that are being handled by this office. After we have had conferences concerning these matters, we will make a decision as to their disposition.

Thank you very much for your cooperation and consideration in the matter.

Yours very truly,

Ernest A. Finney, Jr.

Ernest A. Finney, Jr.

EAF:mew

Encl.

CC Mr. James Farmer, National Director
Congress of Racial Equality

PHONE SP 5-1787 P. O. BOX 802

LAW OFFICES
ERNEST A. FINNEY, JR.
164 WEST LIBERTY STREET
SUMTER, S. C.

1. City of Sumter -vs- Alma Gregg, et al.
(transcript on file in office of Clerk of Court)

2. City of Sumter -vs- Ivor G. Moore

3. City of Sumter -vs- James E. Lewis, et al.

4. City of Sumter -vs- Eddie Drummond and Herman K. Harris

5. City of Sumter -vs- James E. Lewis, et al.

6. City of Sumter -vs- Caroline Singletary,-et al.

7. City of Sumter -vs- Marvin McAllister, et al.

8. City of Rock Hill -vs- Willie Thomas Massey

9. City of Rock Hill -vs- Charles Edward Taylor

10. Town of Hartsville -vs- Herbert Williams and Horace Watts

11. Memorandum

12. Brief on Arrest of students in South Carolina

PHONE SP 5-1737

P. O. BOX 802

LAW OFFICES
ERNEST A. FINNEY, JR.
16½ WEST LIBERTY STREET
SUMTER, S. C.

RECEIVED
JUN 1 1961
VLADECK & ELIAS

May 30, 1961

Mr. Carl Rachlin
Vladeck and Elias
Attorneys At Law
280 Broadway
New York 7, New York

Dear Mr. Rachlin:

Enclosed, you will please find a copy of the information you requested that I secure from the Clerk of Court of Montgomery, Alabama. I hope this information is sufficient for your purposes. As soon as you have completed your study of this matter or have made a copy thereof, I'm requesting that you kindly return the same to me; as, I wish to secure some Injunctions myself.

I was thinking since Jim Farmer is now confined to jail in Jackson, Mississippi and apparently will be there for sometime, it maybe better for me to delay my trip for a week or two.

Please let me know your thinking on this matter.

Yours very truly,

Ernest A. Finney, Jr.

Ernest A. Finney, Jr.

EAF:jed

Encl.
Complaint United States vs United States Klans, et al

Temporary Restraining Order and Order to Show Cause vs United States vs United States Klans, et al

a national organization with affiliated local groups working

CONGRESS of RACIAL EQUALITY

CORE

to abolish racial discrimination by direct, nonviolent methods

38 PARK ROW
NEW YORK 38, NEW YORK
COrtlandt 7-0035

Carl Rachlin, Esq.
general counsel

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field director
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community relations director
James R. Robinson
membership director
James Farmer
national director

June 7, 1961

RECEIVED
JUN 9 1961
VLADECK & ELIAS

Carl Rachlin, Esq.
280 Broadway
New York, New York

Dear Carl:

I tried over and over to reach you, but the strike apparently kept you completely busy.

I could not wait with the memo, copy of which I have enclosed -- now is the time, if ever, that people will go to the trouble to put us in their wills.

I do need the legal language to give anyone who writes in or calls about it. Can you send that to me? I assume the incorporation in New York has gone through by now.

I also wanted to check the stock-gift language, but, as I have seen this by ACLU and as we are currently getting stock gifts by the methods I outline in the memo, I felt sure of the language there.

I am sorry to bother you with this detail now -- but I feel it can make a significant difference in gifts to the organization.

Sincerely yours,

Jim Robinson

James R. Robinson
Membership Director

enc.

CORE - Congress of Racial Equality, Inc.
38 Park Row, New York 38, New York
CO 7-0035

TO: Members and Supporters of CORE

FROM: James R. Robinson, Membership Director

THANKS are in order to the many thousands of you who have given your financial help to CORE during the fiscal year just closed. We realize that many of you had to make personal sacrifices in order to give us the support you did.

Through your contributions you made the Freedom Rides possible. In a very real sense, you were on those buses which have challenged the conscience of a nation! Equally important were the many other projects, local as well as national, which your contributions stimulated.

May I urge those of you who have not given in the past twelve months to send us your help now?

* * *

DO WE HAVE YOUR NAME AND ADDRESS CORRECT? Please check the envelope in which this mailing is received. If there is any error, please indicate it clearly and return the envelope to me. If you receive two copies of this mailing, please return both envelopes. This mailing only is involved -- when we send letters of appeal, they go to many lists other than ours, and a duplicate does not indicate an error on our list.

In writing us and sending contributions, please be consistent in the name you use. If you write us once as Mrs. Adam Smith and the next time as Theresa Smith, both names are apt to get on the mailing list even though only one person is involved (there are many names in file between "Smith, Adam and Smith, Theresa").

* * *

Contributions of Securities:

Although CORE is a non-profit organization, contributions to it have not, as yet, been granted deductibility for income-tax purposes. There is, however, one method which can give some tax help: the contribution of securities on which a capital gain has accrued. If you sell the stock and contribute the proceeds, you pay a capital gains tax. If, however, you contribute the stock directly to CORE, no one pays any capital gains tax. You may have your own broker transfer the stock to an account for "CORE -- Congress of Racial Equality" or, if you prefer, we will designate a broker who has handled such transfers before (write or call James R. Robinson at the CORE office). It is our policy to sell securities shortly after receiving them.

* * *

Legacies:

A few members have remembered CORE in their wills. A legacy to CORE does not have tax benefits to the Estate. For further information, you may write me as Membership Director at the CORE office.

Dear Mr Calvert

Enclosed are [illegible]
in behalf of C O P E [illegible]
If you have seen them [illegible]
you will find your name [illegible]
and return them [illegible]
If you like you may put [illegible]
name as general [illegible]
CARE.

I will try to be [illegible]
in [illegible] as I [illegible]
I am tied up by a [illegible]
I hope in New Jersey

Respectfully
Carrie

March 16th, 1967

Charles E. Cowley, Esq.
516 South Union Street
Montgomery 4, Alabama

Dear Chuck:

I have received a copy of the complaint of the United States. I am at a loss as to how we answer that complaint, since we presumably agree with most of the allegations.

Only if the allegations are FDC written to include us in the conspiracy can there really be anything to answer. I assume that the answer we filed Third-Party Complaint has been filed properly.

Is our motion to dismiss still pending? Should we make a new motion in light of the service upon us of the complaint of the United States? There is still a failure of Party-plaintiff.

Thank you again for your hospitality. It was a pleasure to work with you.

Sincerely yours,

CARL RAGSDALE

CR:mab

LAW OFFICES

SIMON & ROSEN

706 AINSLEY BUILDING, 14 N. E. FIRST AVENUE
MIAMI 32, FLORIDA
TELEPHONES FR 3-6383 · FR 9-5687

TOBIAS SIMON
MAURICE ROSEN

PLEASE REPLY NUMBER:

June 20, 1961

Mr. Carl Rachlin
280 Broadway
New York City, New York

RE: Tallahassee Freedom Riders Case

RETAINER for services to be rendered by Tobias Simon & Howard Dixon	$300.00
DEPOSIT on expenses in Tallahassee	200.00
TRANSPORTATION and expenses for Court Reporter to Tallahassee	90.00
TOTAL:	$ 590.00

June Bond, 1963

Mr. James R. Robinson
Membership Director
CORE
38 Park Row
New York, N. Y.

Dear Jim:

Since the membership organization has been approved, that as a matter of law CORE is legally able to accept bequests. A suitable clause would be the following:

"I give and bequeath to CORE,

Congress of Racial Equality, Inc. of 38 Park Row, New York 38, N. Y. the sum of $_____. I suppose a preference that this sum be used for _____, but I object to restrictions whatsoever to said gift and the same may be used for general purposes of CORE. Congress of Racial Equality, Inc. as it deems advisable."

(Note: The last sentence can be completely eliminated if you wish and the final sentence would be modified to read "to CORE")

Best regards,

Sincerely,

JAMES FARMER

JF:rb

a national organization with affiliated local groups working

to abolish racial discrimination by direct, nonviolent methods

38 PARK ROW
NEW YORK 38, NEW YORK
COrtlandt 7-0035

Carl Rachlin, Esq.
general counsel

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community relations director
James R. Robinson
membership director
James Farmer
national director

June 23, 1961

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VLADECK & ELIAS

Carl Rachlin, Esq.
Vladeck and Elias
280 Broadway
New York 7, New York

Dear Carl:

I am certainly pleased that the membership corporation has finally been approved and that we now can go ahead on the bequest.

I already have one inquiry about a bequest and I am certainly pleased to have the language which you gave to me.

When you get a chance, I would like to talk with you on the telephone.

Sincerely yours,

James R. Robinson

James R. Robinson
Membership Director

JRR:nm

ASSISTANT ATTORNEY GENERAL

Department of Justice
Washington

JUN 27 1961

RECEIVED
JUN 29 1961
VLADECK & ELIAS

Mr. Caarl Rachlin, General Counsel
Congress Of Racial Equality
280 Broadway
New York, New York

Dear Mr. Rachlin:

I wish to thank you for your telegram of June 16, 1961, concerning the closing of dining facilities at the Tallahassee Airport.

The situation referred to is being studied presently by this Department to determine what, if any, action may be taken to alleviate the problem. We shall, therefore, be very happy to receive any information concerning the subject which you feel would be of assistance to us.

Sincerely,

Burke Marshall

BURKE MARSHALL
Assistant Attorney General
Civil Rights Division

LAW OFFICES

SIMON & ROSEN

TOBIAS SIMON
MAURICE ROSEN

706 AINSLEY BUILDING, 14 N. E. FIRST AVENUE
MIAMI 32, FLORIDA
TELEPHONES FR 3-6383 · FR 9-5687

PLEASE REPLY NUMBER:

June 27, 1961

RECEIVED
JUN 28 1961
VLADECK & ELIAS

Carl Rachlin, Esq.
280 Broadway
New York City, N. Y.

Dear Carl:

The Court Reporter per diem for the three sessions on June 22, 1961, was $50.00. This was quite reasonable. The estimated number of pages of testimony was 300, and we will need not less than an original and two copies at an approximate cost of $500.00. To this should be added approximately $150.00 to cover the balance of the appellate costs, including transportation for oral argument and hopefully, that should be about it.

Will you please see to the remittance of the first billed amount and arrange for this item. The appeal must be filed not later than July 20, 1961.

Sincerely,

Please!!

Toby

TOBIAS SIMON

TS:ev

[illegible]

Mr. Burke Marshall, Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D. C.

Dear Mr. Marshall:

Thank you for your letter dated June 27, 1961, which I received this morning. It is my thought that the Administrative agencies have jurisdiction over the activities at airports and can take definitive action in bringing segregation at the airports. While I appreciate the great advances the Department of Justice has made in the last several months in protest barring and anti segregation, I believe until the Department of Justice uses the administrative agencies to do what I did suggest in this letter, the problem will continue. While the [illegible] problem is extremely helpful, in a large sense it is a form of social punishment of such cases as the Freedom Riders case.

Recognizing as you have only stated that other many of the buildings of which acts of segregation have taken place are not under the direct control of the Federal Government, and therefore, direct action against such building is difficult, I nevertheless suggest that the Department of Justice request an order from the Federal Executive which will provide that the agencies will terminate their leases of buildings which fail to [illegible] the services of the airports within five days or ten days or [illegible] the authority owning the buildings in which such segregation takes place, take steps to end the discriminatory practices.

While this remedy on the surface may seem drastic, nevertheless, it gives the [illegible] the authority to [illegible] the Civil Rights Act of 1964 [illegible] the will be used immediately.

I hope that you will seriously consider this suggestion and I would remain as ever,

Your humble servant,

Sincerely,

Dan Rostenkowski
Member, 81st
Congress

cc: Honorable Harold Gosnell
Honorable Mayor
Richard Daley

CHARLES S. CONLEY
ATTORNEY AT LAW

530 SOUTH UNION STREET
SUITE A
MONTGOMERY 4, ALABAMA
AMHERST 9-2361

Cor

June 30, 1961

Carl Rachlin, Esq.
VLADECK AND ELIAS
280 Broadway
New York 7, New York

Dear Carl:

In acknowledgement of your letter, dated June 19, 1961, may I state that a Motion to Quash Service of Summons, Motion to Dismiss Third-Party Complaint, and an Answer to Third-Party Complaint were all filed the Saturday morning preceeding the hearing on the preliminary injunction which you attended. Incidently, we also filed a Motion to Dismiss the Cause Against Additional Defendants Named in The Temporary Restraining Order of June 2, 1961, in Opposition to Motion For Preliminary Injunction.

I believe there is a failure of party-plaintiff in view of the fact that the Government stated quite clearly that it was opposed to the preliminary injunction in the first instance, as well as a hearing on the Motion for a Temporary Injunction. I agree with you when you say that you do not see how we can answer the complaint of the United States, since we agree with most of the allegations contained therein.

The hearing on the temporary injunction is still scheduled for July 17, 1961.

With sincere regards, I am

Cordially yours,

CHARLES S. CONLEY

CSC:cr

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Founded 1920
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July 6, 1961

RECEIVED
JUL 7 1961
VLADECK & ELIAS

Carl Rachlin, Esq.
Vladeck and Elias
280 Broadway
New York 7, N. Y.

Dear Carl:

Thank you for sending me a copy of your June 30, 1961 letter to Burke Marshall. If possible, I would like very much to see his letter to you of June 27th and will photocopy and return it to you promptly. I need this not only because of my concern with the CORE problem but because of another situation which makes me increasingly aware that either Marshall himself is lacking in dynamics or he is being hamstrung by the Administration. I think that it is about time for pressure to be exerted from many directions.

In reading your letter to him it suddenly occurred to me that we have overlooked a whole line of precedents. Without checking, hasn't it been held that a taxi company could not maintain a monopoly position at an interstate railroad facility because the servicing of such facility by a local taxi company affected interstate commerce? (This carries me vaguely back to law school days and I am sure you know more about this subject than I do.) I think, however, that the extension of interstate commerce to all terminal facilities connected therewith has been inadequately explored and presented in the courts.

Fraternally yours,

Rowland

Rowland Watts
Legal Director

Rowland what
Rowland Watts

cc: CORE

Telegram Sent 6/16/61 Post in File Case

1 Administrator
Federal Aviation
Agency
1711 New York Ave
Washington N.W.
D.C.

On behalf of Congress of Racial

Equality, we protest the closing ~~down~~ of dining premises at airport, Tallahassee for purpose of denying such facilities to white and negro diners. We ask you take all action to ~~prevent~~ ferreunate

this ~~interference~~ patent with an necessary ~~part~~ instrumentality of interstate commerce. ~~We are ready to assist you if call~~ If you desire we will give you all information at our disposal and are prepared to meet with you

for that purpose

CR
General Counsel

Same Tel. to

Chairman
Civil Aeronautics Bd.
Universal Bldg
Washington D.C.

Hon Rob't Kennedy
Atty Gen'l United States
Dep't of Justice
Washington D.C.,

Following is telegram we have sent to FAA and CAB. Ask your usual

assistance

SR
Gen'l Counsel

CHARLES S. CONLEY
ATTORNEY AT LAW

530 SOUTH UNION STREET
MONTGOMERY 4, ALABAMA
TELEPHONE 269-2361

August 14, 1961

RECEIVED
AUG 16 1961
VLADECK & ELIAS

Carl Rachlin, Esq.,
VLADECK AND ELIAS
280 Broadway
New York 7, New York

Re: Injunction Proceeding against CORE, et al.

Dear Carl:

This is to acknowledge receipt of your letter dated August 1, 1961, with reference to the present status of the injunction proceeding against the Congress of Racial Equality.

After oral arguments on July 17, 1961, the United States District Court here in Montgomery caused an order to be issued directing all parties to file briefs. I am happy to say that the order was forthwith complied with and in this morning's mail, a copy of an order issued August 11, 1961 was received. Assuming that you did not receive a copy of the above order, I am taking the privilege of enclosing a copy for you, which is of course self explanatory.

With continued regards and esteem, I am

Yours very truly,

Charles S. Conley

CHARLES S. CONLEY

CSC:' cr
Encl.

P.S. Sought to contact you via telephone this morning, but was unsuccessful. C.S.C.

p. 11

ACA v Douds - 339 US 382
Taft-Hartley law, non
communist affidavit
Action to enjoin conducting
election by NLRB
Congress has power to ban
political strikes
Ct called upon to determine
whether law is const'l
"Freedom is not absolute."
"Congress can protect itself against
unlawful conduct"

United Pub Workers v Mitchell
330 US 75
Hatch Act Case
Limitation on political activity
of gov't worker - political rts v
right of Congress to protect itself, country

Ewoes v Carter 336 US 77
(N.J.) - No sound truck on
street

Judge Johnson
Montgomery
Ala.

John Dorr Birkhead - Davis & Watts
Marshall
Greenberg
Pollak
Gray
Conley
Seay
Pachler

Calvin Whitsell for Sullivan & Rosenthal

No. Ct will not enter order to continue restraining order
Issue raised that the motion was not for a third party ~~to~~ complaint but that they were indispensable parties -

Whitsell asks for another restraining order - Ct says put it in writing
Rec'd 6 July 17 11:00 AM

1. - Thank Ct.

2 - Who is CORE
non-violence

3 - Request motion for a temp injunc be denied & 3rd pty complaint to dismissed

4 - (a) All violence on one side
(b) No violence at all by anyone associated with CORE

~~(c) Terminiello case~~
(c) No one caused defts to act illegally
(e) they had merely agitated no violence and no burden on commerce
(d) only acts of defts, not 3rd pty defts, were the burden on commerce
(e) the acts of 3rd pty defts was not a burden, but the very act of commerce
(f) what more basic pt than to

by peaceful means the observance of the practice of the U.S. Const.

(g) Act of Ct (seemingly) regulates
i - violence with peaceful conduct
ii - evil with constitutional rights
iii - threats, or intimidation with no threats and no intimidation

(h) Ct has power to restrain the evil herein, but Ct cannot restrain proper conduct

(i) Cases of Ct are not in point.

(over)

(j) The evil here is in the minds and acts of defts

Decision of Ct ~~encourages~~ tends to encourage such conduct of defts.

(k) defts have achieved their goal; by the act of the Ct they have prevented what they wish prevented

(l) Act of Ct here unwittingly is in aid of illegal discrimination

If defts threaten violence then this court restrains, not only the violence but also those who act without violence

There was no violence in Va., N. Car. S. Car, Ga. only Ala.

SEDFRE U.S. vs MILLER, DAVID J., 1965-1966
(DRAFT CARD BURNING)

Box 43
Folder 28

State Historical Society of Wisconsin

Please Retain Original Order

PKR:vd

Wenfli
Crl Mf
CORE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA :

-v- :

DAVID J. MILLER, :

Defendant. :

- - - - - - - - - - - - - - - - - - X

INDICTMENT

65 Cr. 937

The Grand Jury charges:

On or about the 15th day of October, 1965, in the Southern District of New York, DAVID J. MILLER, the defendant, unlawfully did knowingly destroy and knowingly mutilate a certificate, to wit, a Notice of Classification (SSS Form No. 110), issued pursuant to the Universal Military Training and Service Act, Title 50, Appendix, United States Code, Section 451 et seq., and the rules, regulations and directions made pursuant thereto.

(Title 50, Appendix, United States Code, Section 462(b); 32 Code of Federal Regulations, Section 1623.

FOREMAN

ROBERT M. MORGENTHAU
United States Attorney

NEW YORK CIVIL LIBERTIES UNION
156 Fifth Avenue
New York, N.Y. 10010

MEMORANDUM October 25, 1965

To: The Executive Committee

From: The Staff

Subject: U. S. v. David J. Miller

FACTS

On October 15, 1965, during an anti-war demonstration near the Armed Forces Induction Center at Whitehall Street in lower Manhattan, David J. Miller, a 22-year-old pacifist, mounted a platform and in front of a large crowd, held up his draft card and burned it. Press statements attributed to Miller report him as saying:

> "I think the draft is wrong in itself. It's a form of involuntary servitude.
>
> "I've been thinking along pacifist lines for about two years and I think I have a duty as a citizen to help protect the truth.
>
> "I'm opposed especially to this (Viet Nam) war."

On October 19, 1965, a federal grand jury indicted Miller for "knowingly mutilating and destroying a Selective Service System notice of classification which had been issued to him." On the same day, Miller was arrested in New Hampshire while en route to a "peace crusade" at New England colleges. Miller is to be arraigned in the federal court in Manhattan on Thursday.

ISSUE

Should the NYCLU participate in the Miller case, either by directly representing him, or appearing as amicus?

STATUTE INVOLVED

50 App. U.S.C. 462(b)(3) (Universal Military Training and Service Act) (1951) was amended on August 30, 1965, to provide that:

"Any person . . . (3) who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; . . . shall upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both."

The same penalties apply for knowing violation or evasion of "rules and regulations . . . relating to the issuance, transfer or possession of such certificate." (50 U.S.C. App. §462)

The Selective Service Manual (Oct. 1955) provides:

§1611.27—Every person subject to registration is required to familiarize himself with the rules and regulations governing registration and to comply therewith.

§1617.1—<u>Effect of failure to have unaltered registration certificate in personal possession</u>—Every person required to present himself for and submit to registration must, after he has registered, have on his personal possession at all times his Registration Certificate (SSS Form No. 2) prepared by his local board which has not been altered and . . . . The failure of any person to have his Registration Certificate in his personal possession shall be prima facie evidence of his failure to register . . . .

I.

THE AMENDMENT IS AN UNCONSTITUTIONAL ABRIDGEMENT OF SPEECH BECAUSE IT SEEKS TO SILENCE LEGITIMATE POLITICAL DISSENT. EVEN IF THE STATUTE IS CONSTITUTIONAL ON ITS FACE, IT IS UNCONSTITUTIONAL AS APPLIED TO MILLER.

A. <u>On Its Face</u>

The U. S. Congressional and Administrative News of August 10, 1965 carries the House Armed Services Committee Report which states the legislative purpose of the "destruction and mutilation" amendment:

<u>Purpose of the Bill</u>

The purpose of the proposed legislation is to provide a clear statutory prohibition against a person knowingly destroying or knowingly mutilating a draft registration card.

Explanation of the Bill

Section 12(b)(3) of the Universal Military Training and Service Act of 1951, as amended, provides that a person who forges, alters, or in any manner changes his draft registration card, or any notation duly and validly inscribed thereon, will be subject to a fine of $10,000 or imprisonment of not more than 5 years. H.R. 10306 would amend this provision to make it apply also to those persons who knowingly destroy or knowingly mutilate a draft registration card.

The House Committee on Armed Services is fully aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards.

While the present provisions of the Criminal Code with respect to the destruction of Government property may appear broad enough to cover all acts having to do with the mistreatment of draft cards in the possession of individuals, the committee feels that in the present critical situation of the country, the acts of destroying or mutilating these cards are offenses which pose such a grave threat to the security of the Nation that no question whatsoever should be left as to the intention of the Congress that such wanton and irresponsible acts should be punished.

To this end, H.R. 10306 makes specific that knowingly mutilating or knowingly destroying a draft card constitutes a violation of the Universal Military Training and Service Act and is punishable thereunder; and that a person who does so destroy or mutilate a draft card will be subject to a fine of not more than $10,000 or imprisonment of not more than 5 years.

Committee Position

The Committee on Armed Services, a quorum being present, by a vote of 19 to 1 agreed to favorably report H.R. 10306 to the House of Representatives.

No Senate Report was submitted.

The legislative purpose is not to secure the proper administration of the Selective Service System, but rather, to punish open defiance of governmental authority. The Committee report interprets the act of mutilation as speech, i.e., as an expression of defiance or encouragement of defiance and seeks to justify its suppression on the ground that such acts of defiance or encouragement "in the present critical situation . . . pose . . a grave threat to the security of the Nation."

The civil liberties issue raised by the amendment is whether the expression of political defiance can be silenced because Congress feels the substantive evil of draft card mutilation presents a clear and present danger to the Nation's security.

Appendix A of the ACLU memorandum sets forth several relevant cases. The following cases are also pertinent.

Gitlow v. New York, 268 U.S. 652 (1925) upheld New York's criminal anarchy statute and the conviction of a Socialist for his publication of two pamphlets, both of which advocated the overthrow of government by force and violence. Over the dissent of Justice Holmes and Justice Brandeis the Court held:

> "That utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion."
>
> The Holmes-Brandeis dissent stated:
>
> "If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this Manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief, and, if believed, it is acted on unless some other belief outweighs it, or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration."

In U.S. v. Hartzel, 322 U.S. 681 (1943), the Court reversed a conviction for the distribution of a pamphlet expressing opposition to governmental war policy to persons who included members of the Armed Forces. The Court held the intent of the distributor was to influence people generally and not just those in military service or of draft age. It stated:

> "Few ideas are more odious to the majority of the American people or more destructive of national unity in time of war. But while such iniquitous doctrines may be used under certain circumstances for the purposeful undermining of the morale and loyalty of the armed forces and those persons of draft age, they cannot by themselves, prove, beyond a reasonable doubt, intent (of an evil purpose) . . . ."

In Yates v. U. S., 354 U.S. 298 (1957), Smith Act convictions against second-string leaders of the Communist Party were vacated on the ground that the statement of an idea, too remote from concrete action, was not punishable. The distinction between advocacy and incitement to immediate action as a test distinguishing permissible from impermissible speech would be relevant in assessing the character of the act of draft card burning.

In the light of the legislative purpose and the unclear state of the law, at least the following questions are raised by the statute:

(a) Is it directed to incitement or mere advocacy?

(b) Is what is expressed by the destruction of a draft a substantive evil?

(c) Does such expression create a clear and present danger to the Nation's security?

(d) Is the legislative judgement of a threat to national security a valid one? Or, is such a judgement subject to judicial review?

B. As Applied

If the statute is upheld on the ground that one purpose which it seeks to serve, the preservation of government property, is a valid one, then the question of its application to silence

Miller's specific act is put in issue. (See also ACLU memorandum.) The question of overbreadth is raised when an otherwise valid statute is used to silence speech. In other words, the ordinary destruction of a draft card may be constitutionally punished, but such punishment is impermissible when the act takes on the form of political dissent.

Miller's act was a symbolic expression of defiance to the Government's policies in Viet Nam. It was committed before a large crowd and followed a series of public speeches. Non-verbal symbolic forms of speech command the protection of the First Amendment. Stromberg v. California, 283 U.S. 359 (1931) (red flag); Garner v. Louisiana, 368 U.S. 157, 185 (1961) (sit-in) (Harlan, J. concurring); Cox v. Louisiana, 379 U.S. 536 (1965) (parade). Picketing, an activity combining speech and physical action, is similarly protected, e.g., Thornhill v. Alabama, 310 U.S. 88 (1940). If Miller's draft card burning is a form of speech, then in the scale of protection afforded various types of speech, it deserves the highest degree of protection, because it is speech of political dissent. In order to save the "mutilation" amendment, it would have to be construed in such a way to exclude from punishment acts of destruction which take the form of protected speech.

II.

CRUEL AND UNUSUAL PUNISHMENT

Although there has been considerable publicity concerning a "five year sentence," there is no issue of cruel and unusual punishment presented until such time, if ever, Miller is convicted and sentenced. There is no statutory minimum period of imprisonment or fine which is required under the "mutilation" provision; if convicted, Miller could conceivably receive a suspended sentence or nominal fine.

In Weems v. U. S., 217 U.S. 349 (1910), a Phillipine statute, providing for imprisonment of 12 to 20 years for entry of false statements in public records, was held to violate the Eighth Amendment. It is no authority for attacking a statute with no mandatory minimum sentence.

If Miller is convicted and sentenced, and depending on the sentence imposed, it could be argued that the sentence was "cruel

and unusual." Reference could then be made to the maximum sentences of $100 fine or 30 days or both, which can be imposed for defiling the U.S. flag (4 U.S.C. §3). Similar maximums also can apply to aliens who do not carry alien registration cards.

SUMMARY

1. The statute is unconstitutional because it serves the illegitimate purpose of silencing political dissent.

2. Miller's draft card burning, being a form of protected speech, cannot be punished under the statute.

3. The statute is unconstitutional because it serves no useful purpose, relying as it does on the underlying requirement that registrants carry draft cards. There is no legitimate purpose served by the draft card carrying requirement (See ACLU memo.)

4. No issue of cruel and unusual punishment will be raised unless and until Miller is sentenced and convicted.

STAFF RECOMMENDATION:

Staff recommends entrance by NYCLU into the Miller case. The issue of governmental power and criminal process being used to silence defiant political opposition is a central civil liberties concern.

# # #

[MEMO ON THIS ITEM TO THE BOARD AGENDA FOR OCTOBER 25, 1965.]

AMERICAN CIVIL LIBERTIES UNION
156 FIFTH AVENUE
NEW YORK, NEW YORK 10011

October 21, 1965

To: Board of Directors

From: The Staff

Re: CLEAR AND PRESENT DANGER AND THE VIET NAM PROTESTS

The Office seeks Board guidance in connection with current activities of groups opposed to the war in Viet Nam.

BACKGROUND

The protests in which the anti-war groups are engaged include clearly protected activities such as public rallies, marches, newspaper advertisements, and leaflet distributions, and clearly unprotected acts such as physical interference with the movement of troop trains. It has also been charged that there are a variety of plans afoot to make the draft system "function less smoothly." These are said to include counseling or advising individuals of draft age to feign insanity, homosexuality, drug addiction, or chronic illness. Some groups are urging draft eligibles to destroy their draft cards and refuse any cooperation with Selective Service. One young man has been indicted for violating PL89-152 (Aug.30, 1965) which makes it a crime to knowingly destroy or mutilate draft cards.** Other, more traditional forms of resistance to the draft are found in plans to counsel persons to apply for conscientious objector status, or to publish a pamphlet setting out the rights of CO's and describing the most effective manner of presenting a CO application, though it has been charged here also that this advice will be directed towards persuading persons who are not bonafide CO's to claim that status nonetheless.

Attorney-General Katzenbach indicated last Saturday that an investigation was under way into that part of the Viet Nam protest movement which encourages resistance to the draft. He added, "We may very well have some prosecutions."* The office has already been contacted by groups concerned

---

* Presumably prosecutions would be brought under the Universal Military Training and Service Act of 1948, which punishes: "Any ... person ... who knowingly counsels, aids or abets another to refuse or evade registration or service ... or any person ... who shall knowingly hinder or interfere or attempt to do so ... with the administration of the [ACT] ... 50 App. USC §462(a).

However, if the precedents associated with the hysteria of the period 1917-1921 still have any validity, prosecutions might conceivably be brought under the Seditious Conspiracy Statute, 18 USC §2384, and the Espionage Act, 18 USC §2388, though the latter applies only "in time of war." (It was in part the arrests and prosecutions under these acts which led to the founding of the ACLU in 1920.) In addition, 18 USC §2387, punishes anyone who, with intent to impair the morale of the armed forces, "advises, counsels, urges ... refusal of duty by any member of the military forces ...."

** Concerning the free expression implications of this statute, see Appendix B, a memorandum addressed to the Board by one of the Union's cooperating attorneys.

about punitive action which may be taken against them by the government, and we anticipate requests for advice or assistance in a large number of cases. In order to help the office determine what kind of assistance to provide in threatened prosecutions, Board guidance is sought on the extent to which the ACLU's classic position--the clear and present danger test--protects the various forms of anti-draft activity described above.

ACLU POLICY

The Board's statement of the clear and present danger test, as set forth in 1949 and amended in 1955 is as follows:

> "In the opinion of the ACLU, advocacy, and expressions of opinion, whether made in public or private, are protected by the First and Fourteenth Amendments, except: (a) When they become an integral part of conduct violating a valid law; or (b) When they are a direct incitement to specific and immediate violation of law; or (c) When they threaten a danger of unlawful acts so great and so immediate that time is lacking for answer, or if need be, for other protective measures against the threatened acts.
>
> "Secrecy or anonymity in expressions of opinion or in advocacy is not in itself a barrier to the protection of the First and Fourteenth Amendments.
>
> "Conspiracy is not properly chargeable to persons associated together in the expressions of their opinions or in advocacies except where incitements to or plans for specific unlawful acts create the clear and present danger of such acts.
>
> "The foregoing principles protect anti-democratic propaganda equally with pro-democratic.
>
> "These principles, which together constitute the 'clear and present danger' test, should be applied to safeguard the widest possible freedom of discussion and advocacy."

QUESTIONS PRESENTED

The Staff has discussed this statement and concluded that it is less than unambiguous, when applied to the anti-draft events now before the public.

In the most general sense, the question which the staff debated was the point in time when otherwise legal advocacy loses its constitutional protection because it succeeds in persuading some members of the public to engage in illegal acts. To take a specific case, at what point, if any, on the time continuum can advocacy of non-registration, feigned exempt status, or draft-card burning be made a crime? Certainly not when a lone individual or an organization gives a speech or circulates a pamphlet through the mail

containing such advice. Although in Schenck v. United States Justice Holmes found even more innocuous advice to be unprotected under the clear and present danger test. Presumably this is neither "direct incitement" nor does it "threaten a danger of unlawful acts so great and so immediate that time is lacking for answer."

What if the same speech is made or pamphlet circulated outside Selective Service Headquarters where registration is taking place or outside Army Hq. where draftees are being inducted. Under those conditions, is there "direct incitement," under the 1949 Statement, Sec. (b), or does it depend on whether the registrants or inductees respond affirmatively to the solicitation, or is the speech so totally protected that the crime, if any, is committed not by the advocates, but only by the men who, persuaded by the advocacy, refuse to register or to be inducted.

On the other hand, under the criteria of Sec. (c) of the existing Board Statement, is the danger "so great" when the advocacy is carried out on the steps of the induction center, and "so immediate that time is lacking for answer," or could it be said that the "answer" has already been imparted to the inductees through the accumulation of statements on behalf of the government supporting its foreign policy or the national security imperatives of draft law compliance?

Depending upon the meaning of the words "direct incitement" in the Board's prior Statement, much of the anti-draft, anti-Vietnam movement may be beyond the reach of ACLU involvement, since much of it couples general statements of political, moral or philosophical opposition with advocacy of, and some advice about, illegal methods to defeat government policy.

Perhaps the question to be resolved, put in its simplest form, is whether political advocacy of activity which is made illegal by valid statute can itself be made criminal, and if so, under what conditions? Is such advocacy to be protected only when it is unsuccessful, but not when it is successful? Or is the test whether it presents an imminent threat of success? What new element is added, if any, by advocacy that takes the form of a "how-to-do-it" manual on feigning homosexuality, drug addiction or alcoholism, prepared with professional expertise?

To state the question in another context, ought the ACLU declare that KKK public advocacy of physical assault, which is based on its own truly political ideology, is protected by the First Amendment? What of the advocacy of travel to Cuba or mainland China in violation of the State Department's ban? [The question of conspiracy is related but, we think, distinguishable. A man can advocate criminal conduct without actually participating in its specific commission. But there may be situations where the advocacy is so closely integrated with the illegal conduct, that a conspiracy, or perhaps even an accomplice charge, would lie. For example, a pamphlet or speech which advocates general resistance to the draft law is protected. If it advocates feigned psychosis or homosexuality, it may also be protected, or let us assume so. But what of the same pamphlet distributed on the steps of the induction center? If a recipient acts on the general advice inside the induction center, what crime, other than illegal advocacy, might the distributor be charged with? Worse yet, what if the pamphlet specifically describes how to feign psychosis or homosexuality. Is the distributor a conspirator? An accomplice?]

APPENDIX A

SUPREME COURT CASES

The clear and present danger test was first formulated by Justice Holmes in Schenck v. United States, 249 US 470 (1919). In affirming the conviction under the Espionage Act of a member of the Socialist Party for printing anti-conscription pamphlets, Justice Holmes stated:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature that they will bring about the substantive evils that Congress has a right to prevent."

The leaflet in question did not advocate force or violence to oppose the draft, but attacked conscription as despotism, as a violation of the Thirteenth Amendment and as a tool of Wall Street. It urged "Assert Your Rights", and alleged a "right to assert your opposition to the draft."

In Abrams v. United States, 250 US 616 (1919), which affirmed a similar prosecution for a strongly worded pamphlet attacking U.S. support of Western intervention in the Russian Revolution, Justice Holmes dissented, joined by Justice Brandeis, saying:

> "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."

In Whitney v. California, 274 US 357 (1927), in which the Supreme Court upheld the validity of a criminal syndicalism law, Justice Brandeis, joined by Holmes, stated in his concurring opinion:

> "Advocacy of law-breaking heightens ... [the probability of law-breaking] still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on....
>
> "....To courageous, self-reliant men, with conficence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to... avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression."

OTHER CASES

Two cases passing on the section of the UMTS Act which prohibits counseling, aiding, or abetting others to evade registration (50 App. USC 462(a)) were decided shortly after the creation of the present military service system: Gara v. United States, and Warren v. United States.

In the Gara case, 178 F.2d 38 (CA 6, 1949), in which ACLU participated at the Court of Appeals level, the defendant had urged a student about to be arrested for non-registration:

> "Stand by your principles, don't let them coerce you into registering."

The ACLU argued that, since the offense of non-registration had been committed before the advocacy charged, there was no imminent danger that it would be committed in reliance on the speech and that the speech was therefore protected by the First Amendment.* The court answered this contention by holding that the offense of non-registration was a continuing one and by concluding:

> "it was immaterial whether appellant succeeded in dissuading Ricert from registering. Ever since the decision in Schenck ... it has been the law that where an attempt to obstruct military service, as well as actual obstruction, is penalized by statute, there is 'no ground for saying that success alone warrants making the act a crime.' It is immaterial, also whether appellant did or did not make a practice, as he contends, of counseling only those who were 'inwardly fixed' in their conscience to refuse to register. Under §462, the gist of the crime is the counseling, aiding or abetting the violation, and not the result."

The Court held the anti-counseling provision constitutional, but suggested that "opinions as to the propriety of the law and the policy of a peacetime draft" or a "mere attempt to ... give moral support to someone who is paying the penalty for refusal to register" would not violate the statute.

On review by the United States Supreme Court, the Gara conviction was affirmed by an equally divided court in a per curiam opinion without discussion. 340 US 859 (1950).

Warren v. United States, 177 F.2d 596 (CA 10, 1949), involved a prosecution under the same section for knowingly counseling another not to register under the Act. In Warren, the defendant-counselor was the stepfather of the registrant. In spite of the advice given him, the stepson complied with the Selective Service Act. The court held the anti-counseling provision constitutional and, against the claim that, since the stepson disregarded the advice, there was no clear and present danger that the advice would bring about the commission of a crime, said:

> "it should not be essential to consummate the offense that the person counseling ... should refuse or evade registration or service in the armed forces. Construed otherwise, the provision would be identical in effect with the general aider and abettor statute ... and would serve no useful purpose."

A petition for certiorari was filed and denied by the United States Supreme Court, 338 US 947 (1950).

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* The ACLU brief conceded, "one cannot encourage and counsel an immediate and imminent commission of crime."

Appendix B October 20, 1965

MEMORANDUM REGARDING THE RECENTLY ENACTED FEDERAL LEGISLATION MAKING UNLAWFUL THE DESTRUCTION OF ONE'S SELECTIVE SERVICE REGISTRATION CERTIFICATE ("DRAFT CARD")

The recent statute supplements a previous statute which made unlawful evasion of the draft and, through a prohibition of any violation of regulations promulgated under the 1947 statute, a number of other things, including the failure to carry one's draft card at all times. The previous statute, 50 USCA §462, has been the basis for prosecution for failure to carry the draft card in only two reported instances, apparently: United States v. Kime, 188 F 2d 677 (7th Cir., 1951)(conviction sustained), and United States v. Hertlein, 143 F Supp 742 (E.D. Wis., 1951)(defendant convicted). In the first of these it appears that the defendant's legal arguments were based on freedom of religion, and no other possible constitutional or interpretive claims are asserted. The Court said:

> "A party's religious belief cannot be accepted as a justification for conduct which is made punishable by the law of the land. To permit such justification would be to make the professed doctrine of religious belief superior to the law of the land and in effect would permit every objector to become a law unto himself."

In the second case a conviction on a charge of failing to carry a registration certificate was entered in reliance on Kime.

50 USCA §462 provides maximum penalties of five years imprisonment or $10,000 fine, or both. From newspaper reports it appears that the maximum penalties under the new statute are $5,000 fine, or five years, or both.

The penalties in these latter statutes should be compared with that provided in 4 USCA §3, prohibiting the defiling of the U. S. flag. That statute, which applies only to the District of Columbia, provides that the crime shall be a misdemeanor, punishable by $100 fine, or 30 days, or both.

Comment:

The recent statute making it a crime to destroy one's draft card is undoubtedly unnecessary, in the light of the previously existing statute, as interpreted by the two decisions.

It is believed that there is really no utilitarian purpose for requiring registrants to carry their draft cards. This is not a duty expressly created by the Congress, and thus far, the Selective Service has never had to show any purpose for that requirement. In these circumstances two things seem likely:

1. The regulation requiring the carrying of one's draft card is very susceptible to successful challenge as an unnecessary and unauthorized requirement which, by the bootstraps of the statute, now has the appearance of being a lawful requirement.

2. Both the carrying of the card and the proscription against its destruction are restraints on the individual's conduct for purposes of requiring a symbolic showing of one's recognition of the duty to be available for service in defense of one's country, and a restraint upon any expression of resistance to the assumption of that duty through the destruction of the draft card.

If we set aside the question of the requirement for carrying the draft card for a moment, and at the same time forego the argu-

ment that this combination regulation-statutory duty makes unnecessary the statute prohibiting the destruction of the draft card, there are still serious objections to that statute.

First, it seems clear that the legislative history of the statute would establish that the enactment was in no way associated with facilitating the administration of the draft laws.

Second, compared with the only other statute prohibiting symbolic acts of negation, the punishment is extremely severe. In fact, the punishment seems unduly severe whether compared with the flag-defilement statute or not. Regarding this point, one should note Weems v. United States, 217 U.S. 349, 371, 382 (1910), condemning a Philippine statute prescribing imprisonment of 12 to 20 years for entry of known false statements in a public record, and Trop v. Dulles, 356 U.S. 86 (1958), involving the statute divesting those who deserted in time of war of their citizenship. Brennan's concurrence, 93-114, especially at 114, is particularly appropriate. See also Brennan's concurrence in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 187 (1963).

However distasteful we may find an act which in its physical description is properly described only by the term "destruction," it must not be forgotten that the act can be, and in this case obviously is, a means of expression. If the ephemeral argument that the draft card is government property is the rationale for likening this to the destruction of other, utilitarian, property, it seems likely

that the harsh penalties will force an abandonment of that finely spun web. The essence of legislative power, state or federal, lies in legitimate legislative purpose. After considerable thought, it appears that the only reason the draft card has any importance is because the Congress has invested it with importance. If it can be done to a draft card it can be done to the picture trading cards children get with bubble gum. The point is that legislative protection of this piece of paper must meet a standard of usefulness before the Congress can, with or without the concept of federal ownership, make its destruction punishable.

The previous argument is the old one of "substantive" due process. There has earlier been the suggestion of a "cruel and unusual punishment" question here. Finally, one must recognize that this act has within it some elements of free speech. Lastly it should be mentioned that even before Justice Goldberg's recent exhumation of it, the 9th Amendment had been held to protect one right: political activity. In the light of this, it appears that there are serious civil liberties questions in this recent statute.

Cool R

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA,

65 Cr. 937

-against-

MOTION TO DISMISS INDICTMENT

DAVID J. MILLER,

Defendant.

----------X

S I R :

TAKE NOTICE, that pursuant to the provisions of Rule 12 of the Federal Rules of Criminal Procedure and upon the indictment herein, a copy of which is attached hereto, and upon all the proceedings heretofore had herein, the undersigned will move this Court, at a Criminal Motion Part thereof, to be held in Room 318, United States Courthouse, Foley Square, New York, New York, on November 22, 1965, at 10:30 a.m. of that day, or as soon thereafter as counsel can be heard, for dismissal of the indictment on the following grounds:

1. The indictment fails to charge a crime against the United States, in that knowing destruction and mutilation of a Notice of Classification (Selective Service System Form No.110) does not constitute a violation of Title 50, Appendix, United States Code [hereinafter 50 App. U.S.C.] Section 462(b). Only the destruction and mutilation of a certificate constitutes a violation of such statutory provision, and a "Notice of Classification" (Selective Service System Form No. 110) is

plainly not a "certificate" issued pursuant to the Universal Military Training and Service Act.

2. The indictment, insofar as it charges a violation of 50 App. U.S.C., §462(b)(3) denies defendant his rights to freedom of speech and assembly and to the free exercise of political rights as guaranteed by the First, Ninth and Tenth Amendments to the United States Constitution, because the purpose of said statute is to impermissibly abridge and silence the public expression of opposition to government policies.

3. The indictment, insofar as it charges a violation of 50 App. U.S.C., §462(b)(3), violates defendant's right to due process of law under the Fifth Amendment to the United States Constitution, because said statute serves no legitimate legislative purpose.

4. The indictment violates defendant's right to be free from cruel and unusual punishment under the Fifth and Eighth Amendments to the United States Constitution, insofar as it is brought pursuant to 50 App. U.S.C., §462(b)(3), because it subjects the defendant to felony punishment, such punishment for the acts charged being shockingly cruel, unusual, and inhumane.

Dated: New York, N.Y.
November 15, 1965.

Yours, etc.
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United States Court of Appeals

For the Second Circuit

CR 30465

UNITED STATES OF AMERICA,
Appellee,

against

DAVID J. MILLER,
Defendant-Appellant.

APPELLANT'S BRIEF

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United States Court of Appeals

For the Second Circuit

CR 30465

UNITED STATES OF AMERICA,

Appellee,

against

DAVID J. MILLER,

Defendant-Appellant.

APPELLANT'S BRIEF

Statement of the Case

Procedural History

The defendant-appellant, David J. Miller, was indicted on Oct. 19, 1965. In a single count indictment he was charged with knowing destruction and mutilation of a Selective Service Notice of Classification on Oct. 15, 1965 in violation of Title 50, App., U. S. C. §462 (b). Prior to the filing of the indictment and pursuant to a Commissioner's Warrant of Arrest issued on Oct. 17, 1965, Miller was arrested in Hooksett, New Hamphire, while proceeding to St. Anselm's College as a member of a Catholic Worker peace team that had been invited to the college to discuss pacifism with the student body (71a).* Waiving extradition, Miller

* Numbers in parentheses, followed by the letter "a" refer to page numbers of Appellant's Appendix.

pleaded not guilty on Oct. 27, 1965 in the Southern District of New York. Miller moved to dismiss the indictment on First and Fifth Amendment grounds; the motion was denied on Dec. 16, 1965 with a written opinion by Hon. Harold R. Tyler, Jr., U. S. D. J. (6a-17a), reported at 249 F. Supp. 59. Subsequently, Miller was tried before Judge Tyler, sitting without a jury, on Feb. 9 and 10, 1966. Miller's motion for a directed acquittal on constitutional grounds at the end of the Government's case was denied (36a), as was his motion at the close of the trial (102a). Convicted after trial, Miller was sentenced on March 15, 1966 to three years' imprisonment, execution suspended, and placed on probation for two years subject to the Court's standing probation order, and upon three special conditions: (1) that he secure and carry at all times a draft card, (2) that he obey orders of his Selective Service Board, and (3) that probation terminate if and when Miller enters military service (3a-4a). Miller is presently at large, on bail of $500 (4a).

Background

The International Days of Protest, scheduled for Oct. 15, 16 and 17, 1965 consisted of a program of activities designed to air opposition to the United States government's war policies in Vietnam (38a). As part of these events, a "Whitehall Speakout", or protest meeting, in front of the U. S. Army Induction Center on Whitehall Street in New York City, had been announced for Oct. 15, 1965 (37a-39a). Announcement of the Speakout was accomplished through advertisements in newspapers, press releases and leaflets (37a, 40a-45a). The program schedule for the Speakout listed fourteen speakers, one of whom was Miller (116a,

Def. Ex. C; 120a, Def. Ex. E). The informational leaflet distributed before and during the meeting stated:

> "there will be *no civil disobedience.* Our job now, as originally announced, is to communicate our views about the draft and the war in Vietnam to Selective Service employees, young men facing the draft and the many spectators in the street— and to do this as effectively as we can."

The Meeting

The Speakout took place on Water Street, between Moore and Whitehall Streets, at the side of the induction center (51a). It began at about 4:30 p.m. and ended at about 6:30 p.m. (51a). Seventy-five to one hundred hecklers were present; they were separated from the protest audience by police barricades (68a). There was a large banner which said "End the War in Vietnam" at the Whitehall Street side of Water Street. The size of the audience was variously estimated at 100 (45a), 100 to 200 (68a), 275 to 325 (26a) and 1000 (61a). Also present were 35 to 50 police officers and 15 to 20 representatives of the news media (26a).

The focal point of the protest meeting was a panel truck, complete with ladder or stairs, platform, loudspeaker and microphone (39a-40a). From the truck an American flag waved over the meeting (40a). Except for several minutes after Miller's speech, there was no evidence adduced to show the meeting was ever disorderly (49a).

The meeting began with folksongs (45a). Speakers followed, the first of whom was Melvyn Baron (47a). Two themes ran through the speeches: an end to the war in Vietnam and opposition to the draft (47a).

Miller's Role

Miller appeared in the middle of the program. He was introduced by the chairman, Albert Uhrie, as "someone who will certainly not go into the Armed Forces to fight the war in Vietnam", as "a member of the Catholic Worker group" (47a, 62a) and as "[t]he young conscientious objector" (69a).

At the microphone Miller said he "was not going to give a prepared speech" (69a). He also said he "was a Catholic pacifist and as such opposed to all wars" and that he "was particularly opposed to the war in Vietnam, and the conscripting of young men for that war" (69a). Commenting on the hecklers, he said "they really knew what was going on in Vietnam, the napalming of villages and the torturing of prisoners and that [he] didn't want to have any part in this action" (69a). Stating that he "would let the action of burning [his] draft card speak for itself" (69a), and that he hoped "this will be a significant political act" (69a), he burned his Notice of Classification while standing on the platform in front of the audience.

The "most eloquent statement of the meeting" (63a) was received with "[t]remendous applause" (63a), "cheers, clapping" (29a), and "tremendous booing" (63a) from the barricaded crowd of hecklers.

Miller's decision to burn his draft card was entirely his own (70a). The idea of burning it had "crystallized" in early September, soon after he received the Notice classifying him 1-A (81a). He made the final decision the night before he spoke (67a). In part it was an act of conscience

(78a, 91a). He explained he had burned his card "as a symbolic protest in opposition to conscription, to the Selective Service System, to the war in Vietnam, and to the draft card burning law itself" (76a). He thought he was engaging in constitutionally protected activity (91a), and he regarded it as an "act of free expression" (94a). Judge Tyler found Miller to be "undoubtedly sincere" in his purposes (103a).

Miller did not urge others to burn their draft cards (28a, 51a, 70a) and there was no testimony that anyone else burned draft cards at the meeting (29a, 52a, 70a). He did not urge anyone to march anywhere or to do anything (52a, 70a).

Defense Testimony

Albert Uhrie, chairman of the meeting, testified as the first defense witness (37a-52a). He said the themes of the speeches before Miller spoke were: "an end to the war in Vietnam and opposition to the draft" (43a). Uhrie, who was on the platform with Miller, generally corroborated Miller's account of his short speech (48a, 52a). In comparing the applause of the several speakers, Uhrie said "the applause after Dave's speech was much greater in length and intensity than anyone else" (49a). He testified he saw no one entering or leaving the induction center during the meeting and that he believed the induction center had closed one-half hour before the meeting began (51a).

Melvyn Baron testified as the second defense witness (54a-59a). He had understood the meeting purpose to be a protest "against the war in Vietnam and against the

draft'' (55a). He was the first speaker and presented a historical analysis of the American involvement in Vietnam from 1954 to the present; he concluded with an assessment that the United States was violating international law (56a). Baron heard Miller's speech and generally corroborated Miller's account of it (57a). He observed that there had been ''a great deal more applause'' at the close of Miller's speech than there had been for other speakers (58a).

Harry Hale Purvis testified as the third defense witness (59a-63a). He was a spectator at the meeting. He recounted the theme of the program, expressed through speeches and singing as ''the immorality of war in Vietnam and the immorality of compelling young men to participate in these immoral actions in Vietnam'' (61a). Purvis generally corroborated Miller's account of his speech, which he described as the ''highlight of the meeting'' (63a).

Miller's Background and Character

Miller, 22 at the time of the incident, graduated in June of 1965 from Le Moyne College, Syracuse, a Jesuit college (64a). Immediately thereafter he moved to New York City and became a staff member of the Catholic Worker Movement (64a). The movement is a small group of lay Catholics who live in voluntary poverty and serve the Bowery poor; it is also actively involved in working for peace, civil rights and social justice (64a). Miller is in charge of the men's clothing room and, oftentimes, also of the house money (65a). Miller shared the views of the movement in opposing the war in Vietnam, compulsory military service and war in all forms (64a-65a, 85a, 113a,

Def. Ex. F). In his junior year in college Miller became disturbed over conscription, and war. In his senior year he became an acknowledged pacifist (83a). Thereafter he developed a position of relative non-cooperation with Selective Service (87a). His position was set forth in a letter sent to his Local Board and received by it on June 21, 1965. In part, it stated:

> "I am returning the current information questionnaire (incomplete) and my selective service card because I can no longer in good conscience continue cooperating with the draft system. I feel that the conscription law itself is unjust despite the present C. O. alternatives. I don't believe further that it would ever be right for me to kill a man. I am particularly opposed to the practice and theory of modern warfare. I am absolutely positive that no justice, much less any charity, could ever proceed from present day physical warfare and that includes both imperialistic and revolutionary war. I shall try to work for just peace as best I can in a non-violent personal manner" (113a, Def. Ex. F).

Two of Miller's past instructors at Le Moyne testified as character witnesses. Robert J. Flavin, an Assistant Professor of English at Sacred Heart University, Bridgeport, Conn., testified Miller was reputed to be of "impeccable character" and a "man who is committed to some of the best elements of Christianity * * *" (98a-99a). Charles R. Cassily, an Assistant Professor of Philosophy at Le Moyne, testified Miller was reputed to have "the highest reputation of any student they have had in relation to his character. It is undoubted" (101a).

The Government's Case

The Government's case consisted of testimony of four agents from the Federal Bureau of Investigation and two employees of the Selective Service System. Agent Robert G. Ibbott's testimony concerning the protest meeting and the role played by Miller was substantially in accord with the testimony presented by the defense (6a-32a). Ibbott testified, however, that standing twenty feet away from Miller he could not hear anything that Miller said (23a). However, he did testify that he heard Miller being introduced (23a), sounds projected by Miller's voice over the microphone (23a), other speeches (30a), folksinging (30a), and "a few remarks" made by Miller (30a). His audial lapse did not preclude him from also testifying that Miller spoke both "before and after" the burning (30a).

Agent John S. Madden (Rec. 32-42) testified as to Miller's arrest and non-possession of his Notice of Classification. Agent Edgar M. Miner and Agent Frederick E. Webb presented, respectively, fingerprint and handwriting testimony (Rec. 43-47; Rec. 48-52).

Norman C. Smith, an employee in the Property and Supply Department of the New York Headquarters of Selective Service testified relative to the paper stock characteristics of Notices of Classifications (Rec. 125-133).

Gladys Leverette, Chief Clerk of Local Board 58, Syracuse, New York, testified concerning Miller's relations with his draft board (30a-36a). She had typed a report recounting that Miller, on Sept. 3, 1965, had picketed the board office (34a-35a, 116a, Def. Ex. H). She also testified the draft board had "all of the documents necessary for the purpose of processing * * * Mr. Miller, for pre-induction physical and for induction" (35a).

Constitutional and Statutory Provisions

United States Constitution, First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

United States Constitution, Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just conpensation."

Title 50, Appendix, United States Code, Section 462(b)

(Language inserted by P. L. 89-152, 79 Stat. 586, amendment to Section 462(b) is emphasized).

"(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title (sections 451-454, 455-471 of this Appendix); or rules or regulations promulgated hereunder; or (2) who, with

intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title (said sections), or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title (said sections) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury."

Questions Involved

1. Whether Title 50, App., U. S. C. §462(b) is an unconstitutional abridgment of freedom of expression guaranteed by the First Amendment, on its face, because its legislative history unequivocally reveals that it was de-

liberately intended and enacted for the purpose of suppressing dissent.

2. Whether the statute is an unconstitutional abridgment of freedom of expression as applied to the facts of this case because the conduct which it seeks to punish was a peaceful act of symbolic speech, permissible under the clear and present danger test, or the balancing test.

3. Whether the statute does not serve any rational legislative purpose, and is therefore an unconstitutional deprivation of individual liberty without due process of law, in violation of the Fifth Amendment.

ARGUMENT

POINT ONE

The statute is an unconstitutional abridgment of freedom of expression guaranteed by the First Amendment, both on its face and as applied to the facts of this case.

A. The statute must be tested against the constitutional restrictions on Congressional power to legislate in the area of the First Amendment.

It is fundamental that Congress has no power to prohibit non-violent speech advancing a lawful purpose. "Congress shall make no law * * * abridging the freedom of speech. * * *" U. S. Constitution, First Amendment. The peaceful expression of unpopular views cannot be made criminal by legislative fiat. *Ashton* v. *Kentucky,* —— U. S. ——, 34 LW 4398, May 16, 1966; *Lamont* v. *Postmaster General,* 381 U. S. 301 (1965); *Cox* v. *Louisiana,* 379 U. S.

536 (1965); *New York Times Co.* v. *Sullivan,* 376 U. S. 255 (1964); *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *N. A. A. C. P.* v. *Button,* 371 U. S. 415 (1963); *Terminiello* v. *Chicago,* 337 U. S. 1 (1949); *Thomas* v. *Collins,* 323 U. S. 516 (1945); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Herndon* v. *Lowry,* 301 U. S. 242 (1937).

Political speech criticizing the conduct of foreign and military policy of the Federal Government is entitled to the hghest degree of protection under the First Amendment. *Bridges* v. *California,* 314 U. S. 252 (1941); *DeJonge* v. *Oregon,* 299 U. S. 353 (1937); *Stromberg* v. *California,* 283 U. S. 359 (1931). Speech of dissent and criticism is constitutionally protected as a mechanism for correcting and testing the validity of governmental action. In the words of Justice Holmes:

> "* * * when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophesy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of

the law that an immediate check is required to save the country."

Abrams v. *United States,* 250 U. S. 616, 630 (1919) (Dissenting Opinion)

An equally classic rationale for the First Amendment's scope of protection was given by Justice Brandeis in *Whitney* v. *California,* 274 U. S. 357, 375-376, 377 (1927) (Concurring Opinion):

"Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace of freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public

discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

* * *

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore, always open to Americans to challenge a law adbridging free speech and assembly by showing that there was no emergency justifying it."

Chief Justice Hughes, speaking for the Court, in *Stromberg* v. *California, supra,* wrote:

"The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our Constitutional System." (*Id.* at 369)

B. The statute is unconstitutional on its face because its legislative history unequivocally reveals that it was deliberately intended and enacted for the purpose of suppressing dissent.

1. The propriety of examining legislative history to determine constitutionality

Title 50, App., U. S. C. §462(b), prior to the 1965 amendment, was a statute which sought to prevent fraud in the operation of the Selective Service Registration System. Each subdivision, save the last, was directed at preserving the integrity of the honest administration of the registration scheme. Subsection 6 was left as an open-ended provision, inviting the issuance of regulations, consonant with the main and primary purpose of the subsection (b). The statutory purpose of preventing fraud is derived from the plain meaning of the subsection's provisions.

In 1965, subsection (3) was amended by the insertion of four words: "knowingly destroys, knowingly mutilates". The insertion of these four words serves no fraud prevention purpose. Indeed, so jarring is the insertion, that the meaning of the amendment's purpose cannot be derived from its statutory context. It can only be understood in light of current events and the amendment's legislative history.

When the statutory purpose is unclear, and its terms apparently innocuous, reference to the legislative history, and the historical setting in which it was enacted becomes relevant. *Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936); *cf. Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960); *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449 (1958); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886).

In *Grosjean,* a newspaper advertising tax statute enacted by the Louisiana Legislature, apparently innocent and innocuous on its face, was held an unconstitutional violation of First Amendment rights. It appeared that the tax was deliberately designed by the Huey Long administration to reach large city newspapers of substantial circulation, but not rural newspapers of lesser circulation, "* * * with the plain purpose of penalizing the publishers and curtailing the circulation of a select group of newspapers." *Id.* at 251. Mr. Justice Sutherland, for a unanimous court, held that the tax was unconstitutional:

> "* * * because in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of its constitutional guarantees." (*Id.* at 250)*

That the legislative purpose is a desirable, indeed necessary element in determining the constitutionality of Congressional enactments is borne out by two recent Supreme Court decisions.

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* That the Supreme Court was fully apprised of the "plain purpose" and "present setting" of the tax statute is evident from Appellees' Brief in the Supreme Court:

> "The newspapers published by the appellees have, from time to time, in their editorials, severely criticized the political practices and policies of the 'Long Faction' and for some time prior to, and during, the Regular Session of the 1934 Legislature there had been open and vigorous opposition by said newspapers to the policies and practices of said faction. The leaders and various members of said faction, during said time, openly and vehemently denounced said newspapers in political addresses and speeches on the floor of the Legislature, and in circulars widely distributed through employees of the various State departments under their control, and threatened the newspapers with taxation on their advertising (R. 42).
>
> "During said Regular Session of the Legislature of 1934 after the introduction and prior to the final passage of Act No. 23, a

In upholding the constitutionality of the Voting Rights Act of 1965, the Court, per Chief Justice Warren, viewed the application of historical experience, including Congressional purpose as necessary to the determination of the statute's constitutional propriety. *South Carolina* v. *Katzenbach,* 383 U. S. 301, 308 (1965). The Court's extensive preoccupation with the legislative history was for the purpose of evaluating the statute's constitutionality and not to determine the grammatical construction or meaning of its numerous provisions.

The constitutionality of an apparently unambiguous statute was involved in *Lamont* v. *Postmaster-General,* 381 U. S. 301 (1965), in which the Court held that a postal regulation violated the First Amendment's guarantee of freedom of speech. The Court affirmed the unanimous decision of the District Court which held the statute unconstitutional *on its face* after a close examination of congressional intent. "A reading of the legislative history makes it abundantly clear that the purpose of the new legislation was primarily to control, restrict and prevent

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circular was issued over the names of Governor Oscar K. Allen and the late Senator Huey P. Long, and was widely distributed throughout the State. Copies thereof were laid on the desk of each member of the Legislature during its Regular Session of 1934 while said Act No. 23 was under consideration. This circular contained the following language:

" 'The lying newspapers are continuing a vicious campaign against giving the people a free right to vote. We managed to take care of that element here last week. A tax of 2% on what newspapers take in was placed upon them. That will help their lying some. Up to this time they have never paid any license to do business like everybody else does. It is a system that these big Louisiana newspapers tell a lie every time they make a dollar. This tax should be called a tax on lying, 2¢ a lie' (R. 43)."

the delivery of matter found to be communist propaganda, an infringement upon the dissemination of ideas, and, therefore, a clear and direct invasion of First Amendment territory". *Heilberg* v. *Fixa,* 236 F. Supp. 405, 409 (N. D. Calif. S. Div. 1964).

In the Supreme Court, Mr. Justice Brennan's concurring opinion often refers to Congress' intent in enacting the statute. *Lamont* v. *Postmaster-General, supra,* at 308, 310. Moreover, the Government's brief puts great emphasis on what it alleges Congress was attempting to regulate through the passage of the statute. See Supreme Court Brief for Postmaster-General, p. 12, citing "Postal Rate Revision of 1962", Hearings before the Senate Committee on Post Office & Civil Service, 87th Cong., 2d Sess. (1962), pp. 842-843, 918-919, 930. The teaching of these recent cases is that even if a statute is seemingly clear on its face, it may be held violative of the First Amendment if the court concludes that the purpose of the statute is to abridge the exercise of free speech, notwithstanding alternative interpretations which might be gleaned from the words of the statute itself or its legislative history.

It is certainly judicially noticeable that the United States Government, during the course of the last several years, has become increasingly militarily-committed to greater and greater involvement in the conflict which now envelops Vietnam. The Government's military commitment in this area of the world represents a major foreign policy decision. As in the development of any significant course of governmental conduct, the growth of our commitment in Vietnam has occasioned sharp criticism by groups and individuals opposing the Government's policies. When-

ever there has occurred the exercise of substantial federal power, particularly in connection with foreign military operations, there is bound to be criticism of its exercise. It is no different today than it was in 1812, 1898, 1914 or 1941.

The manner of opposition to governmental policy in Vietnam has found expression in classic forms: speeches, vigils, marches, writings, and petitions. New methods of expression have also been used: teach-ins, and the symbolic burning of individual Selective Service Certificates and Notices.

This then is the historical setting in which the amendment was enacted. The legislative history of the amendment clearly reflects this setting and demonstrates that the purpose of the amendment was to suppress speech critical of governmental foreign policy.

2. *Examination of the legislative history* *

On August 5, 1965, Representative L. Mendel Rivers (Dem.-S. C.) introduced H.R. 10306 providing for the amendment of §12(b)(3) of the Universal Military Training and Service Act of 1951, Title 50, App., U. S. C. §462 (b)(3), as follows:

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* The legislative history is documented in Exhibits A through E annexed to this Brief. On the importance of legislative materials in determining statutory purpose, see *Galvan* v. *Press,* 374 U. S. 522, 526-8 (1954) (sponsor, floor debates, subsequent memorandum of sponsor as "weighty gloss"); *NLRB* v. *Denver Building & Construction T. Council,* 341 U. S. 675, 686-9 (1951) (sponsor, Conference Report); *Elder* v. *Brannan,* 341 U. S. 277, 284-6 (1951) (author, Committee Chairman, Reports, Hearings); *Ahrens* v. *Clark,* 335 U. S. 188, 191-192 (1947) (Senate Manager, floor discussion); *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643, 648 (1931) (entire Congressional history).

"(3) who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate or any notation duly and validly inscribed thereon;" (Proposed amendment italicized).

On August 9, 1965, H.R. 10306 was favorably reported to the Committee of the whole House by the House Committee on Armed Services and Representative Rivers submitted House Report No. 747, 89th Congress, 1st Session in connection with the bill (Ex. A to Brief). The House Report states that the amendment is not intended to protect against the destruction of government property, but rather to suppress open defiance of governmental authority:

"The House Committee on Armed Services is fully aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidence in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards.

"While the present provisions of the Criminal Code with respect to the destruction of Government property may appear broad enough to cover all acts having to do with the mistreatment of draft cards in the possession of individuals, the committee feels that in the present critical situation of the country, the acts of destroying or mutilating these cards are offenses which pose such a grave threat to the security of the Nation that no question whatsoever should be left as to the intention of the Congress that such wanton and irresponsible acts should be punished."

On August 10, 1965, Representative Rivers, speaking in the House in support of the bill, stated:

"The purpose of the bill is clear. It merely amends the draft law by adding the words 'knowingly destroys and knowingly mutilates' draft cards. A person who is convicted would be subject to a fine up to $10,000 or imprisonment up to 5 years. It is a straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards.

"We do not want to make it illegal to mutilate or destroy a card per se, because sometimes this can happen by accident. But if it can be proved that a person knowingly destroyed or mutilated his draft card, then under the committee proposal, he can be sent to prison, where he belongs. This is the least we can do for our men in South Vietnam fighting to preserve freedom, while a vocal minority in this country thumb their noses at their own Government." (Congressional Record—House, August 10, 1965, at 19135) (Ex. B to Brief).

Representative Bray (Rep.-Ind.), in support of the bill, eloquently delineated its purpose: it was to suppress expressions of contempt for the United States, to punish those who disrespect American institutions, to facilitate a rebirth of patriotic sentiment, and to end toleration of evil. In the words of the Congressman:

"The need of this legislation is clear. Beatniks and so-called 'campus-cults' have been publicly burning their draft cards to demonstrate their contempt for the United States and our resistance to Communist takeovers. Such actions have been suggested and led by college professors—professors supported by taxpayers' money."

* * *

"These so-called 'student' mobs at home and abroad make demands and threats; they hurl rocks and ink bottles at American buildings; they publicly mutilate or burn their draft cards; they even desecrate the American flag. Chanting and screaming vile epithets, these mobs of so-called 'students' and Communist 'stooges' attempt to create fear and destroy self-confidence in our country and its citizens and to downgrade the United States in the eyes of the world.

"Such organized 'student' groups in the United States have sent congratulations and money to Ho Chi Minh and have made anonymous and insulting calls to families of our servicemen killed in Vietnam.

"This proposed legislation to make it illegal to knowingly destroy or mutilate a draft card is only one step in bringing some legal control over those who would destroy American freedom. This legislation, if passed, will be of some assistance to our country if the officers and courts charged with the enforcement of the law will have the energy, courage, and guts to make use of it.

"The growing disrespect for our law and institutions in America holds a real threat to our country and to our freedom. Just 5 short years ago no one would have believed that disrespect for our country could have grown to the proportions that it has today."

* * *

"One of America's greatest sources of strength in discouraging these demonstrations is to pause and consider the greatness of America—to appreciate what our country has done for the benefit of mankind. Let us be proud, possessed not of an arrogant pride, but a humble pride in our greatness, in our heritage." (Ex. B to Brief, *id.* at 19135).

Without benefit of any additional debate (save the comments of Congressman Rivers and Bray), on August 10, 1965, with 393 yea votes against a solitary negative, the bill passed the House.

On that same day Senator Strom Thurmond (Rep. S. C.), introduced an identical bill in the Senate, and stated:

> "Mr. President, recently the public and officials of our country have been appalled by reports of mass public burnings of draft registration cards. It is not fitting for our country to permit such conduct while our people are giving their lives in combat with the enemy." (Congressional Record—Senate, August 10, 1965, at 19012) (Ex. C to Brief).

On August 12, 1965, with a technical amendment as to section numbering, the Senate Committee on Armed Services favorably reported the proposed amendment and submitted Senate Report No. 598, 89th Congress, 1st Session (Ex. D to Brief) in support of the bill. The Committee explained that the bill was directed at political dissenters. It stated:

> "The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies."

On August 13, 1965, Senator Thurmond remarked on the Senate floor:

> "Recent incidents of mass destruction of draft cards constitute open defiance of the warmaking pow-

ers of the Government and have demonstrated an urgent need for this legislation."

* * *

"Such conduct as public burnings of draft cards and public pleas for persons to refuse to register for their draft should not and must not be tolerated by a society whose sons, brothers, and husbands are giving their lives in defense of freedom and countrymen against Communist aggression." (Congressional Record—Senate, August 13, 1965, at 19669) (Ex. E to Brief).

With no more before it than the Senate Committee Report, and the pithy statements of Senator Thurmond, the greatest deliberative body in the world passed the bill without objection on August 13, 1965. (*Ibid.*)

Thus, within the space of eight days, without hearings, with two short Committee Reports and with floor statements by two Representatives and one Senator, the amendment was literally hurried through Congress. Fifteen days later, on August 30, 1965, H.R. 10306 received Presidential approval and became Public Law 89-152, 79 Stat. 586.

It would be hard to find a statute, whose legislative history more succinctly and unanimously sets forth the purpose sought to be achieved. The evil at which the statute is directed is "open defiance" and "contempt" for governmental authority expressed by "dissident persons who disapprove of national policy". A more obviously illegitimate purpose could hardly be devised. See *Grosjean* v. *American Press Co., supra,* and accompanying discussion at pages 15-16, *supra.* The legislative history bears all the hallmarks of a frenzied rush to sup-

press dissent. There was no free and fearless debate, no sober reflection and reasoning heard in the halls of Congress. There was only a single point of view expressed, and it went unchallenged except for one solitary, albeit unexplained, negative vote.

Unanimity of viewpoint, hurried enactment, and imposition of heavy criminal punishment for political dissent emblazon the amendment with the typical characteristics of oppression. Furthermore, the statute's purpose is superficially and clumsily disguised, so as to present the appearance, despite its unconstitutional purpose, of innocuous legitimacy. It wears the dress of innocent language in transparent attempt to avoid the broad proscriptions of the First Amendment.

This is hardly the first instance recorded in American jurisprudence where reprehensible and unconstitutional laws have been enacted under a hypocritical cloak of propriety. The English sought to suppress the American colonists' speech, not directly, but through stamp taxes. See *Grosjean* v. *American Press Co., supra.* States have sought to curtail civil rights activity, not directly, but through improper prosecutions, see *Cox* v. *Louisiana,* 379 U. S. 536 (1965); or through corporate registration schemes, see *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449 (1958). Illustrations of attempted repression by indirection are, unfortunately, numerous, ranging from anti-Negro grandfather clauses, *Lane* v. *Wilson,* 307 U. S. 268 (1939), to anti-oriental laundry ordinances, *Yick Wo v. Hopkins,* 118 U. S. 356 (1886), to "white only" membership qualifications, *Nixon* v. *Condon,* 286 U. S. 73 (1932).

But the devious manner in which the statute achieves its illegitimate end does not render its objective any less invalid. To paraphrase Justice Frankfurter: The First Amendment "nullifies sophisticated as well as simple-minded modes of" suppressing speech. *Lane* v. *Wilson, supra.*

C. The statute is unconstitutional as applied to the facts of this case because the conduct which it seeks to punish is a peaceful act of symbolic speech designedly conducted in an effective but constitutionally permissible manner under circumstances which fall well within the outer limits of the clear and present danger test, and which, in the application of the balancing test, compel a determination that the free speech consideration outweighs all countervailing considerations.

1. Symbolic speech is protected by the First Amendment.

In defining the scope of the First Amendment, and ascertaining if any proscribed activity is within its coverage, it is clear that "abstract discussion is not the only species of communication which the Constitution protects;" *National Association for the Advancement of Colored People* v. *Button,* 371 U. S. 415, 429 (1963). As the Supreme Court has "repeatedly stated", the Constitutional guarantees of freedom of speech, freedom of assembly, and freedom of petition "are not confined to verbal expression. They embrace appropriate types of action. * * *" *Brown v. Louisiana,* 383 U. S. 131, 141, 142 (1966). Chief Judge Sobeloff has written, summarizing the applicable decisions of the Supreme Court: "The First Amendment affords protection not merely to the

voicing of abstract opinions upon public issues. It also protects implementing conduct which is in the nature of advocacy." *National Labor Relations Board* v. *International Longshoremen's Association,* 332 F. 2d 992 (4th Cir. 1964).[1]

Appellant urges that when he delivered a speech at a public meeting protesting American foreign and military policy, and expressing his strong personal conscientious objection to participation in any war, and especially to the war in Vietnam, his act of burning his Selective Service Notice of Classification as a portion of his speech was no more than an "appropriate type of action" embraced within the constitutional guarantee. It was "implementing conduct * * * in the nature of advocacy." Although this appeal presents a case of first impression involving the constitutionality as applied to appellant of the specific statute involved, there are a series of decisions of the Supreme Court which have established the doctrine that "symbolic speech" is such an "appropriate type of action" as is embraced within the First Amendment.

The author of the concept "symbolic speech" was Mr. Justice Jackson. The occasion for its authorship was the

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1. Cf. Mr. Justice Brennan's Alexander Meiklejohn Lecture, delivered at Brown University on April 14, 1965:

> "Many forms of expression have presented questions under the First Amendment. These questions have been raised in cases involving sit-ins and other forms of racial demonstrations, the picket line, the motion picture, the lawsuit when employed as political expression to seek legal redress for violation of civil rights * * * and many others."

Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment", 79 *Harv. L. Rev.* 1, 4 (1965) (footnotes omitted).

decision of the Supreme Court holding that a compulsory flag salute was an unconstitutional violation of the First Amendment rights of Jehovah's Witnesses school children. Writing the opinion of the Court, in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 633 (1943), Mr. Justice Jackson recalled the Court's 1931 decision holding unconstitutional California's anti-radical "red flag" law:

> "Over a decade ago Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guarantees of the Constitution. *Stromberg* v. *California,* 283 U. S. 359.[2] Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual *to communicate by word and sign* his acceptance of the political ideas it thus bespeaks." (Emphasis added.)

Elsewhere in the opinion, Mr. Justice Jackson had this to say about expression via symbols:

> "There is no doubt that * * * the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, insti-

2. Although there is no express articulation in the Opinion of the Court, the Dissenting Opinion recognized that the court had decided that "the mere display of a flag as the emblem of a purpose, whatever its sort, is speech within the meaning of the constitutional protection of speech and press * * *." *Id.* at 376. Cf. Chafee, *Free Speech in the United States* 336 (1941): "As Mr. Justice Butler was quick to observe, a flag is not speech. It does not talk." New York's "red flag" law was held unconstitutional on the express authority of *Stromberg* v. *California,* in *People* v. *Altman,* 241 App. Div. 858 (1st Dept. 1934). On the spate of red flag laws which were enacted following World War I, see Chafee, *op. cit. supra,* at 162 *et seq.*

> tution or personality, is a short cut from mind to mind. * * * A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." *Id.* at 632-633.

Although not articulated in terms of "symbolic speech" until Mr. Justice Jackson wrote his memorable *Barnette* opinion, *supra,* the precedent of the "red flag" case assisted the Supreme Court in determining that peaceful picketing is protected by the First Amendment. On the same day that it decided *Thornhill* v. *Alabama,* 310 U. S. 88 (1940), the Court also decided *Carlson* v. *California,* 310 U. S. 106 (1940). Holding a municipal anti-picketing ordinance unconstitutional, Mr. Justice Murphy wrote for the Court:

> "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information of matters of public concern. *Stromberg* v. *California,* 283 U. S. 359." *Id.* at 112-113.

In a later case, *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.,* 312 U. S. 275, 293 (1941), Mr. Justice Frankfurter wrote, for the Court: "Peaceful picketing is the workingman's means of communication."[3]

The concept of communication via symbols or other nonverbal acts has likewise played a role in the formulation of constitutional doctrine to cope with civil rights demon-

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3. Prof. Kalven has observed that the sit-in demonstration is the "poor man's printing press." Kalven, *The Negro and the First Amendment,* 133 (1965). Cf. *Martin* v. *Struthers,* 319 U. S. 141, 146 (1943): "Door to door distribution of circulars is essential to the poorly financed causes of little people."

strations. The most carefully articulated statement is by Mr. Justice Harlan, concurring in *Garner* v. *Louisiana,* 368 U. S. 157, 185 (1961). "We would surely have to be blind not to recognize that petitioners were sitting at these counters, where they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country." *Id.* at 201. Mr. Justice Harlan developed this line of thought by express reference to *Stromberg* v. *California, supra,* and to *West Virginia Board of Education* v. *Barnette, supra*:

> "Such a demonstration, in the circumstances of these two cases, is as much a part of the 'free trade in ideas' *Abrams* v. *U. S.,* 250 U. S. 616, 630 (Holmes, J. dissenting), as is verbal expression, more commonly thought of as 'speech'. It, like speech, appeals to good sense and to 'the power of reason as applied through public discussion' *Whitney* v. *California,* 274 U. S. 357, 375 (Brandeis, J., concurring), just as much as, if not more than, a public oration delivered from a soapbox at a street corner. This court has never limited the right to speak, a protected 'liberty' under the Fourteenth Amendment, *Gitlow* v. *N. Y.,* 268 U. S. 652, 666, to mere verbal expression. *Stromberg* v. *California,* 283 U. S. 359; *Thornhill* v. *Alabama,* 310 U. S. 88; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 633-4. See also *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 460. If the act of displaying a red flag as a symbol of opposition to organized government is a liberty encompassed within free speech as protected by the Fourteenth Amendment, *Stromberg* v. *California, supra,* the act of sitting at a private lunch counter with the consent of the owner, as a demonstration of opposition to enforced segregation, is surely within the same range of protections. This is not to say, of course, that the Fourteenth Amendment reaches to

demonstrations conducted on private property over the objection of the owner * * * just as it would surely not encompass verbal expression in a private home if the owner has not consented." *Id.* at 201-202.[4]

The civil rights demonstration as a form of communication has received its most recent consideration by the Supreme Court in *Brown* v. *Louisiana, supra.* By a vote of 5-4, the Court reversed breach of the peace convictions of five Negro members of CORE who, in a deliberate effort to desegregate a public library in Clinton, Louisiana, staged a peaceful, silent, sit-in and stand-up demonstration. The "prevailing opinion"[5] of Mr. Justice Fortas describes what happened:

> "Petitioners, five adult Negro men, remained in the library room for a total of ten or fifteen minutes. The first few moments were occupied by a ritualistic request for service and a response. We may assume that the response constituted service, and we need not consider whether it was merely a gambit in the ritual.

4. This portion of Mr. Justice Harlan's opinion is quoted at length, and apparently with approval, by Mr. Justice Brennan, concurring in *Brown* v. *Louisiana, supra,* at 143, 146, fn. 5. Prof. Kalven writes: "This passage * * * quite deliberately associates the sit-in as a form of communication with the passionate free speech rhetorics of Holmes in *Abrams* and Brandeis in *Whitney.* Indeed, the identification of the sit-in with a First Amendment freedom could hardly be more vigorous * * *." Kalven, *op. cit.* at 131. Cf. "The Supreme Court : 1961 Term," 76 *Harv. L. Rev.* 54, 124, n. 167 (1962).

5. The phrase is that of Mr. Justice Black who wrote the dissenting opinion. *Id.* at 151, 152, fn. 1. Mr. Justice Fortas' opinion was joined in by the Chief Justice and Mr. Justice Douglas. Mr. Justice Brennan and Mr. Justice White wrote separate concurrences. Curiously, the court below in this case, in its memorandum opinion of March 7, 1966, saw fit to cite Mr. Justice Black's dissenting opinion, but made no reference to, and much less no effort to distinguish, any of the opinions of the majority Justices (20a).

> This ceremony being out of the way, the Negroes proceeded to the business in hand. They sat and stood in the room, quietly, as monuments of protest against the segregation of the library. They were arrested and charged and convicted of breach of the peace under a specific statute." *Id.* at 139

The conclusion was that the Louisiana breach of the peace statute "cannot constitutionally be applied to punish petitioners' actions in the circumstances of this case", *id.* at 142, since they were "engaged in lawful, constitutionally protected exercise of their fundamental rights." *Id.* at 143.[6]

The meaning of all of the decisions which have just been discussed, appellant submits, is that symbolic speech is nevertheless speech, and commands the protection of the First Amendment. The Court below, in its opinion of December 16, 1965, wrote that citations offered "in support of this proposition are cases involving statutes, which, largely by their terms, proscribed 'symbolic speech' * * * or unrea-

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6. The Government argued below that only Mr. Justice Harlan reached the constitutional question in the sit-in case, *Garner* v. *Louisiana, supra,* and that all of the other Justices "fastidiously avoided" it. Government's Memorandum in Opposition to Defendant's Motion to Dismiss, p. 37. In *Brown* v. *Louisiana, supra,* it is clear that at least four Justices, and perhaps five, have reached this constitutional question. See Concurring Opinions of Mr. Justice Brennan and Mr. Justice White. Furthermore, whatever may be the case with respect to *sit-in* demonstrations, a clear majority of the court has agreed that street civil rights demonstrations are protected by the First Amendment, notwithstanding the fact that they include the communication of ideas "by *conduct* such as patrolling, marching and picketing." *Cox* v. *Louisiana,* 379 U. S. 536, 555 (1965). (Emphasis added.) The Court pointed out that the First Amendment did not afford such conduct the "same kind of freedom" as "pure speech". But it explicitly recognized that in both instances, pure speech and conduct, ideas were communicated, and the First Amendment applied, albeit to differing extents.

sonably compelled such speech * * *." (10a). The Court cited *Stromberg* v. *California, supra,* the red flag case, and *West Virginia State Board of Education* v. *Barnette, supra,* the flag salute case. Assuming, *arguendo,* that this is a distinction with a difference, the argument nevertheless collapses upon an examination of all of the symbolic speech cases, rather than just a selected few. Thus, the picketing cases, *Thornhill* v. *Alabama, supra,* and *Carlson* v. *California, supra,* involved anti-picketing statutes which did not "largely by their terms" proscribe symbolic speech. And the civil rights demonstration cases, *Garner* v. *Louisiana, supra,* and *Brown* v. *Louisiana, supra,* involved the same Louisiana breach of the peace statute, whose terms had nothing to do with symbolic speech. See also *N. A. A. C. P.* v. *Button, supra* (regulation of practice of law); *N. L. R. B.* v. *International Longshoremen's Association, supra* (N. L. R. B. order to desist from boycott alleged to be unfair labor practice).

It is appellant's contention that a constitutionally proper definition of the scope of the First Amendment[7] is one which is broad enough to include all modes of symbolic speech, or communication of ideas by conduct, *Cox* v. *Louisiana, supra,* at 555. The test is not the form, or method,

7. The free speech clause of the First Amendment is not the only constitutional provision concerned with speech which has been given a broad definition. Art. I, Section 6, provides that "for any Speech or Debate in either House" members of Congress "shall not be questioned in any other Place." The Supreme Court has held: "It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible * * * to things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson,* 103 U. S. 168, 204 (1880); *U. S.* v. *Johnson,* 383 U. S. 169, 179 (1966).

or mode of expression, but rather whether all of the circumstances amount to a clear and present danger, or require that a balance be struck in favor of restricting the expression, depending on which of these tests is to be invoked.[8]

In the 1941 decision of *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc., supra,* the Court reaffirmed but distinguished its recent decisions in *Thornhill* v. *Alabama, supra,* and *Carlson* v. *California, supra,* and held that there was no free speech protection for acts of violence committed on the picket line. The Court's opinion, written by Mr. Justice Frankfurter, includes the following rationale:

> "It must never be forgotten, however, that the Bill of Rights was the child of the Enlightenment. Back of the guaranty of free speech lay faith in the power of an appeal to reason by *all the peaceful means for gaining access to the mind.* It was in order to avert force and explosions due to restrictions upon *rational modes* of communications that the guaranty of free speech was given so generous a scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. *Such utterance* was not meant to be sheltered by the Constitution." *Id.* at 293. (Emphasis added).

The First Amendment does not protect, according to *Meadowmoor,* "utterance in a context of violence." But, *absent the violence,* it does protect "*all* the peaceful means for gaining access to the mind", all "*rational modes* of communication" (emphasis added). We discuss below the applicability of the clear and present danger test or the *ad hoc* balancing test to the statute and the facts of this case. But the inevitable conclusion which emerges from the argument

8. See discussion of both tests, *infra,* at pp. 38-42.

thus far, is that there is nothing foreordainedly illicit in an attempt to gain access to the mind by means of the symbolic act of burning a piece of paper as a portion of a speech made at a public meeting. It is surely a "rational mode[s] of communication."

2. *There is a constitutional right to make one's speech as effective as possible, subject to the proper constitutional standard.*

The court below in its opinion of March 7, 1966, undertook "to answer the specific arguments of defendant's able counsel", and then stated the principle argument as "the First Amendment would permit Miller to make the most dramatic and compelling speech possible, such as the symbolic event which he perpetrated, with full immunity from prosecution under this or any other statute."[9] With all respect, this was not then and is not now the argument made by defendant-appellant's counsel. We do not urge that there are no limits to what can be done under the banner of communication and receive the protection of the First Amendment. In our view, the constitutional limits are measured by the clear and present danger test, although we urge that the same result will be reached via application of the *ad hoc* balancing test. Both tests are discussed in the next section of this brief.

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9. The words "or any other statute" are gratuitous. Counsel's argument was confined to the statute under which appellant was convicted. We argued that *this* statute was unconstitutional both on its face and as applied to appellant because it sought to penalize a technique of expression which does not approach the point of clear and present danger to national security. We did not make the argument that any statute which limited any act of communication was unconstitutional, and we are constrained to take exception to the lower court's suggestion that we made such an argument.

What counsel did urge then, and are urging now, is that *within the limits established by any applicable constitutional test,* the First Amendment does, in fact, include the right "to make the most dramatic and compelling speech possible." To put it another way, the First Amendment does not circumscribe its protection to only the most boring and least effective speech possible. "* * * [O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State,* 308 U. S. 147, 163 (1939). Subject always to reasonable limitations imposed by the necessity of traffic controls and the application of the proper constitutional test, the speaker has the right to choose the place where he can be most effective, *Martin* v. *Struthers,* 319 U. S. 141, 150 (1943), *Schneider* v. *State, supra;* the time where he can be most effective, *Mills* v. *State of Alabama,* —— U. S. ——, 34 LW 4418, May 23, 1966; and the manner in which he can be most effective, *Saia* v. *New York,* 334 U. S. 558 (1948), *Kovacs* v. *Cooper,* 336 U. S. 77, 87 (1949); see *Williams* v. *Wallace,* 240 F. Supp. 100 (M. D. Ala. (1965) (mandatory injunction authorizing 45 mile protest march on public highway from Selma to Montgomery, Alabama, by civil rights demonstrators); *United Electrical, Radio & Machine Workers of America* v. *Baldwin,* 67 F. Supp. 235, 242 (D. Conn. 1946) (allowing picketing at home of Governor, Judge Smith held: "To ban such activity because it is unpleasant to have such publicity at home is to admit the effectiveness of this kind of free expression * * *").[10]

10. The issue of effectiveness arises in two contexts. In one, the speaker, because of limited resources, if he desires to be effective, has no other choice but the mode of expression which is proscribed. Thus the concept of "the workingman's means of communication,"

The obvious rationale for the protection of the most effective means of expression has been well-stated by Mr. Justice Black:

> "I cannot accept * * * [the] view that the abridgment of speech and press here does not violate the First Amendment because other communications are left open. This reason for abridgment strikes me as being on a par with holding that governmental suspension of a newspaper in a city would not violate the First Amendment because there continues to be radio and television stations. First Amendment freedoms can no more validly be taken away by degrees than by full swoop." *N. L. R. B.* v. *Fruit & Vegetable Packers,* 337 U. S. 58, 79-80 (1964) (Concurring Opinion.)

3. The proper constitutional standard is the clear and present danger test, and application of such test compels a determination of unconstitutionality. However, even if this Court prefers to apply the balancing test, the balance of interests is strongly weighted in favor of freedom of expression, and likewise requires a holding of unconstitutionality.

As the trial court points out in its March 7 opinion, appellant admitted that he did that which is proscribed by the statute (18a, 19a). But under our constitutional system, no legislative act is sacrosanct. It is elementary that if the statute is unconstitutional on its face or as applied to him, he committed no crime. The Court below cites *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490,

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and the "poor man's printing press". See footnote 3, *supra,* and accompanying text. In the other context, the speaker has several options available, but elects to utilize the mode of expression which he regards as most effective for his purposes. See *Mills* v. *Alabama, supra*; *N. L. R. B.* v. *Fruit & Vegetable Packers, infra*; *U. E. R. M. W. A.* v. *Baldwin, supra.*

498 (1949), to the effect that freedom of speech does not extend immunity to "conduct in violation of a valid[11] criminal statute."[12] Since a valid criminal statute presupposes a constitutional statute, the fact that appellant's conduct, which comes within the purview of the First Amendment,[13] was proscribed by statute, by no means *disposes* of the constitutional question. On the contrary, it simply *raises* the question of the constitutionality of the statute, both on its face and as applied.

Appellant urges that the constitutional validity of the statute, and appellant's conviction, must be evaluated in accordance with the requirements of the clear and present danger test:

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11. Judge Tyler's December 16, 1965 opinion quotes *Giboney* in *haec verba,* but, the March 7, 1966 opinion paraphrases the holding by reference to "a *presumptively* valid criminal statute." (21a) (Emphasis added.) It is submitted that such paraphrasing is not supported by a reading of the decision. Furthermore, it is legally erroneous, since there is no presumption of validity for legislative enactments which "in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic instructions." *Thornhill* v. *Alabama, supra,* at 95-96. "The presumption rather is against the legislative intrusion into these domains." *United States* v. *C. I. O.,* 335 U. S. 106, 140 (1948) (Concurring Opinion, Rutledge, J.). See cases cited at pp. 46-47, *infra.*

12. *Giboney* was a holding that the First Amendment does not immunize violations of the Missouri anti-trust laws. A reading of the decision will show that the picketing truck drivers, although members of a union, were acting as independent ice peddlers in a trade association seeking to compel a certain ice manufacturer to deal only with themselves. Obviously the fact that combinations and conspiracies in restraint of trade are implemented by speech, i.e., meetings, telephone calls, exchange of confidential price lists, does not render the anti-trust laws impotent. Furthermore, the First Amendment does not prevent the application of anti-trust laws to the newspaper business. See *U. S.* v. *Associated Press,* 326 U. S. 1 (1945).

13. See *U. S.* v. *Smith,* 249 F. Supp. 515, 517 (S. D. Iowa 1966). See, generally, cases cited at pp. 26-35, *supra.*

> "The question in every case is whether the words used are used in such circumstances and are of such a nature to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." [14]

Applying this test, in *Herndon* v. *Lowry,* 301 U. S. 242 (1937), the Supreme Court reversed the conviction of a Communist Party organizer who was admittedly advocating among Georgia Negroes the establishment of a Negro Black Belt separate Republic. Mr. Justice Roberts wrote for the Court:

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterance of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered." *Id.* at 258.

What is the substantive evil which Congress sought to prevent by enactment of the statute under review?[15] There is certainly no apprehension of danger to organized government. We argue elsewhere in this brief that the statute is unconstitutional on its face, because its legislative history

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14. This is the classic expression by Mr. Justice Holmes in *Schenck* v. *U. S.,* 249 U. S. 47, 52 (1919). See *Whitney* v. *California,* 274 U. S. 357 (1927). See also, *Wood* v. *Georgia,* 370 U. S. 375 (1962); *Thomas* v. *Collins,* 323 U. S. 516 (1945); *Taylor* v. *Mississippi,* 319 U. S. 583 (1943); *Bridges* v. *California,* 314 U. S. 252 (1941); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1941); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Sellers* v. *Johnson,* 163 F. 2d 877 (8th Cir. 1947), cert. den. 332 U. S. 851 (1948).

15. The only reference by Judge Tyler to the clear and present danger test came during colloquy on sentencing. In response to counsel's suggestion that defendant's acts did not create any clear and present danger, the Court said: "No clear and present danger. You are quite right" (111a).

discloses a blatantly unconstitutional purpose—the deliberate suppression of a specific form of dissent.[16]

But assuming bona fide legislative purpose, the most that can be said for the substantive evil is that Selective Service registrants who destroy or mutilate their certificates will not have them available for inspection, for either their own benefit or the government's benefit. In Judge Tyler's December 16, 1965 opinion he specifies a benefit to the registrant, i.e., to rescue himself from "an erroneous bureaucratic assumption of a higher classification" (12a), but despite two general references he does not specify *any* advantage to the Government.[17] Furthermore, the Court appears to concede defendant's argument that destruction of the card "will not impede the possible callup of defendant" (13a). At the trial the Government's Selective Service witness admitted this on cross-examination (35a), and there was no contrary testimony. Nor was there *any* testimony presented by the Government bearing on any substantive evil which this statute was designed to prevent. The ineluctable conclusion, appellant urges, is that under the clear and present

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16. See pp. 15-26, *supra.*

17. He writes at 12a that it does not "require unusual imagination to conceive of the several desirable and perhaps in some instances crucial administrative advantages to the Selective Service officials and draft boards in a system of personal retention of classification information by each draftee." Again at 13a he writes that "it would be easy to take notice in detail of other obvious benefits to the authorities and the public of the requirement of continuous retention by each individual of his Notice of Classification." But nowhere in the opinion is there any delineation of "advantages" or "benefits" to the Government. And in its March 7, 1966 opinion, the trial court stated that "the governmental purpose of this statute is clear enough", and referred only to its December 16 opinion.

danger test the statute has been unconstitutionally applied, and the conviction must be reversed.

While appellant urges the application of the clear and present danger test, it is recognized that in the light of a number of recent First Amendment decisions of the Supreme Court, the *ad hoc* balancing test might be utilized.[18] The test is simply that in each individual case the Court must balance the interest in freedom of expression against "the magnitude of the public interests which the * * * [statute is] designed to protect" and "the pertinence which * * * [the statute bears] to the protection of those interests." *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, 93 (1961) (per Mr. Justice Frankfurter). See also *Cox* v. *Louisiana, supra; Barenblatt* v. *U. S.,* 360 U. S. 109 (1959); *NAACP* v. *Alabama,* 357 U. S. 449 (1958); *American Communications Association* v. *Douds,* 339 U. S. 382 (1950).

What is the magnitude of the public interests which the statute herein is designed to protect? And how pertinent is the statute to the protection of those interests? For the purposes of this argument, appellant assumes that there is substantial magnitude to the public interest sought to be protected, i.e., the proper functioning of the Selective Service System. But appellant urges that this statute has no pertinence whatsoever to the achievement of such legislative purpose. As pointed out, *supra,* the Court below has thrice reiterated that the statute is of aid to the adminis-

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18. For an analysis of both the clear and present danger test and the balancing test, see Emerson, "Toward a General Theory of the First Amendment", 72 *Yale L. J.* 877, 910-912, 912-914 (1963). For a well-reasoned critique of the balancing test see Frantz, "The First Amendment in the Balance", 71 *Yale L. J.* 1424 (1962).

tration of the Selective Service System, but has failed to give a single supporting reason.[19]

On the other side of the balance is the restriction of freedom of expression. Even if non-verbal communication is entitled to less weight on the free speech side of the balance, than "pure" speech, *Cox* v. *Louisiana, supra,* it must nevertheless be balanced. Appellant urges that the application of the balancing test compels a conclusion that our society loses more in free speech than it gains in Selective Service administration by the application of the statute to appellant.

4. Conclusion

It is clear that Congress could pass no law which by its express terms provided, "Any speech which criticizes, attacks, or mocks the Federal government's efforts in Vietnam shall be punished, etc. * * *" Nor could Congress provide that "Any speech where the speaker announces that he will refuse to serve in the armed forces, or otherwise expresses defiance of the authority of the Federal government shall be punished, etc. * * *"

If a Selective Service registrant, addressing a public meeting criticizing the government's foreign policy, held aloft his Registration Certificate, and said words to the effect of "I detest and execrate this piece of paper and everything for which it stands", surely the attempted punishment of such verbal action would be beyond Constitutional limits. It is submitted that insofar as concerns Congressional power under the First Amendment, the symbolic

19. See footnote 17, *supra,* and accompanying text.

expression of destroying or mutilating the piece of paper in such a context creates no constitutionally significant difference.

A statute which expressly prohibits the right to express political dissent would admittedly violate the First Amendment. It would be a palpable incongruity, it is respectfully submitted, to uphold a statute which achieves the same result because accomplished under another guise. "It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost & Trucking Co.* v. *Railroad Comm.*, 271 U. S. 583, 594 (1926); *Gomillion* v. *Lightfoot*, 364 U. S. 339, 345 (1960).

POINT TWO

Since the statute does not serve any rational legislative purpose, it is an unconstitutional deprivation of individual liberty without due process of law contrary to the guaranty of substantive due process contained in the Fifth Amendment, both on its face, and as applied to appellant.

It has long been recognized that there exists a constitutional right of substantive due process which protects individual liberty from improper Federal action under the Fifth Amendment, and corresponding state action under the Fourteenth. "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." *Meyer* v.

Nebraska, 262 U. S. 390, 399-400 (1923). Accord: *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925); see *Truax* v. *Raich,* 239 U. S. 33, 43 (1915).

In *Meyer,* the court held it was a deprivation of the liberty of teacher and student to ban the teaching of the German language in the Nebraska public schools. *Pierce* held unconstitutional, as a deprivation of the liberty of parents to educate their children, an Oregon statute which compelled attendance at public schools, to the exclusion of private religious schools. Both *Meyer* and *Pierce* noted the absence of any emergency requiring such extraordinary measures; *Meyer* at 403; *Pierce* at 534. *Truax* held unconstitutional an Arizona statute which sought to restrict the employment of aliens. In each case there was a deprivation of individual liberty in violation of the principle of substantive due process.

There was a period in our nation's judicial history when courts invoked this doctrine to set aside welfare legislation, and measures seeking to regulate industry in the public interest. See *Lochner* v. *New York,* 198 U. S. 45 (1905). But, as Mr. Justice Douglas observed, writing for the Court in *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 488 (1955):

> "The day is gone when this Court uses the due process clause of the 14th Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out-of-harmony with a particular school of thought."

It is to be noted that this statement of judicial self-restraint is limited to business and industrial regulation.

In *Griswold* v. *Connecticut,* 381 U. S. 479, 482 (1965), the Court again speaking through Mr. Justice Douglas, developed the argument somewhat further in considering the constitutionality of Connecticut's anti-contraceptive law:

> "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."

The holding of the Court was that the statute violated a constitutional right of marital privacy contained within the penumbra of several specific guarantees of the Bill of Rights, including the Fifth Amendment. And it specifically reaffirmed "the principle of the *Pierce* and the *Meyer* cases." *Id.* at 483.

Appellant submits that the meaning of this passage in *Griswold* is that there is a constitutionally-significant distinction between the application of the due process clause to economic, business and social regulation, and its application to Federal and State laws which infringe on individual liberty.[20] The individual "liberty" of which a person may be deprived includes "the full range of conduct which the individual is free to pursue." *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954). This includes not only the various rights comprehended in the *Meyer, Pierce* and *Truax* cases, but also the right of privacy, *Griswold* v. *Connecticut,*

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20. *Cf.* Henkin, "'Selective Incorporation' in the Fourteenth Amendment", 73 *Yale L. J.* 74, 85 (1963): "Substantive due process, as is well known, found its origin and its wild and questionable growth in regard to economic regulation; only comparatively recently has it begun to protect political and civil liberties."

supra; the right to travel, *Aptheker* v. *Secretary of State,* 378 U. S. 500, 505 (1964), *Kent* v. *Dulles,* 357 U. S. 116 (1958), and "In the light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress * * *" *Galvan* v. *Press,* 347 U. S. 522, 530 (1954), undoubtedly other rights as well.[21]

Viewed from another angle, the ordinary presumption of constitutionality of a legislative act does not exist where the legislation infringes on individual liberty or any other preferred constitutional right enshrined in the Bill of Rights. *U. S.* v. *Carolene Products,* 304 U. S. 144, 152, fn. 4 (1938); *Schneider* v. *State,* 308 U. S. 147, 161 (1939); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940) ("Mere legislative preference for one rather than another means for combating substantial evils, therefore, may well prove an inadequate foundation on which to rest regulations which are arrived at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Id.* at 95-96); *A.F. of L.* v. *Swing,* 312 U. S. 321, 325 (1941); *Murdock* v. *Pennsylvania,* 319 U. S. 105, 115 (1943); *Thomas* v. *Collins,* 323 U. S. 516 (1945) ("* * * the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment * * * that priority gives these liberties a sanctity and a sanction not permitting dubious intrusions." *Id.* at 529-530); *Marsh* v. *Alabama,* 326 U. S.

21. *Cf.* Mr. Justice Goldberg, concurring in *Griswold* v. *Connecticut, supra,* at 492: "As any student of this Court's opinions knows, this Court has held, often unanimously, that the Fifth and Fourteenth Amendments protect certain fundamental personal liberties from abridgment by the Federal Government or the States." (Citing cases.)

501, 509 (1946); *United States* v. *C.I.O.*, 335 U. S. 106 (1948) ("The presumption rather is against the legislative intrusion into these domains." *Id.* at 140; Concurring Opinion, Rutledge, J.)

The court below has held that the enactment of the statute "is a reasonable exercise of the powers of Congress to raise armies in the defense of the United States" (13a). But substantive due process imposes limitations "upon all powers of Congress, even the war power" *Galvan* v. *Press, supra.*[22] The test continues to be whether the legislative action is "arbitrary or without reasonable relation" to some competent legislative purpose. *Meyer* v. *Nebraska, supra.*

That the enactment of the statute was *ab initio* arbitrary and for an improper legislative purpose, is evident from a review of the legislative history, *supra.* That it bears no legitimate or reasonable relationship to the war power is established from the language of the statute, testimony at the trial, the opinion below, and public facts of which this Court can take judicial notice.

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22. Although war powers are broad, legislation enacted under such powers has been sustained in cases where the courts have found a persuasive, rational relationship between the enactment and the economic and military conditions of war preparedness. See, *e.g.*, *Arver* v. *United States,* 245 U. S. 366 (1918) (enactment of Selective Service legislation); *Yakus* v. *United States,* 321 U. S. 414 (1944) (authority to prescribe commodity prices); *Bowles* v. *Willingham,* 321 U. S. 503 (1944) (authority to prescribe maximum rents); *Lichter* v. *United States,* 334 U. S. 742 (1948) (renegotiation of profits from war contracts); *Woods* v. *Miller,* 333 U. S. 138 (1948) (rent control). In all of these cases, the legislation was essential either to increase the size of our armed forces or to make our economic resources available for the war effort.

The destruction of a Selective Service certificate by its bearer, in no way affects the economic or military capabilities of the United States. It is common knowledge that the Selective Service System, through the local boards, and various City, State and National Headquarters, maintains extensive records of each male American citizen. Perhaps the destruction of *these* records might endanger national security. To punish an individual citizen who destroys *his own* certificate as a form of public protest is to strike at conduct which is entirely too remote from the waging of and preparation for war.

The legislation was not sought by the Selective Service System. There were no hearings, and there is no indication in the legislative history that the views of the Selective Service System were solicited, or even of any concern to those who pushed through the amendment. Indeed, such evidence as there is of the views of the Selective Service System is that the legislation was completely unnecessary for the operation of the System. See *Philadelphia Evening Bulletin,* October 29, 1965, p. 5, where Lt. Gen. Lewis B. Hershey, Director of the System, is reported to have stated in a speech that the law was not necessary.

The only testimony at the trial concerning the usefulness to the Selective Service System of the certificate-retention requirement, is that it was of *no use.* According to the testimony of the Government's Selective Service witness, whether or not David Miller retained any document in his possession was completely irrelevant to his induction by the Selective Service System (35a). As noted before, the opinions below concede as much,[23] and although

23. See fn. 17, *supra,* and accompanying text.

they thrice refer to the fact that the statute is of value to the Government, they do not provide any specification as to what that value is.[24] It is therefore surprising to note the Court's concluding characterization of the statute, in its March 7, 1966 opinion, as being part of "an effective means of drafting young citizens for military service" (21a). The Court's holding that to rule in favor of Miller "would be virtually to license him and others so inclined to ignore their responsibilities to the national defense requirements of this nation" (21a) is almost a self-evident *non-sequitur.*

The court below stated in its opinion of March 7, that it was ruling against the position urged in this portion of the brief, because "this court cannot and will not substitute its judgment for that of Congress * * *"[25] (21a). Appellant submits that this appellate court should not substitute legislative judgment, but should exercise its judicial function to declare the statute, and its application to David Miller, to be an unconstitutional deprivation of liberty without due process of law.

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24. See Wainwright, "A Serious To-Do About a Silly Law", *Life,* Vol. 60, No. 9, March 4, 1966, p. 17.

25. *Cf. Commonwealth* v. *Karvonen,* 219 Mass. 30, 32-33 (1914):

> "Its [the legislature's] determination in this regard cannot be pronounced by the courts contrary to the fundamental law, as being arbitrary or unreasonable, or as having clearly no relation to the ends for which the police power may be exercised."

(upholding the constitutionality of Massachusetts statute which proscribed the display of red or black flags).

Conclusion

It is respectfully submitted that the statute should be declared unconstitutional both on its face and as applied. The judgment of the court below should be reversed, and the indictment dismissed.

June, 1966

Respectfully submitted,

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EXHIBITS TO BRIEF

Exhibit A

[1]

House of Representatives

89th Congress—*1st Session*

Report No. 747

PROHIBITION OF DESTRUCTION OR MUTILATION OF DRAFT CARDS

AUGUST 9, 1965.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. RIVERS of South Carolina, from the Committee on Armed Services, submitted the following

REPORT

[To accompany H.R. 10306]

TheCommittee on Armed Services, to whom was referred the bill (H.R. 10306) to amend the Universal Military Training and Service Act of 1951, as amended, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of the proposed legislation is to provide a clear statutory prohibition against a person knowingly destroying or knowingly mutilating a draft registration card.

EXPLANATION OF THE BILL

Section 12(b)(3) of the Universal Military Training and Service Act of 1951, as amended, provides that a person

who forges, alters, or in any manner changes his draft registration card, or any notation duly and validly inscribed thereon, will be subject to a fine of $10,000 or imprisonment of not more than 5 years. H.R. 10306 would amend this provision to make it apply also to those persons who knowingly destroy or knowingly mutilate a draft registration card.

The House Committee on Armed Services is fully aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards.

While the present provisions of the Criminal Code with respect to the destruction of Government property may appear broad enough [2] to cover all acts having to do with the mistreatment of draft cards in the possession of individuals, the committee feels that in the present critical situation of the country, the acts of desroying or mutilating these cards are offenses which pose such a grave threat to the security of the Nation that no question whatsoever should be left as to the intention of the Congress that such wanton and irresponsible acts should be punished.

To this end, H.R. 10306 makes specific that knowingly mutilating or knowingly destroying a draft card constitutes a violation of the Universal Military Training and Service Act and is punishable thereunder; and that a person who does so destroy or mutilate a draft card will be subject to a fine of not more than $10,000 or imprisonment of not more than 5 years.

Exhibit A

COMMITTEE POSITION

The Committee on Armed Services, a quorum being present, by a vote of 19 to 1 agreed to favorably report H.R. 10306 to the House of Representatives.

FISCAL DATA

Enactment of this legislation will not involve the expenditure of any Federal funds.

CHANGES IN EXISTING LAW

In compliance with paragraph 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill are shown as follows (changes in existing law are printed in italic):

SECTION 462(b)(3) OF TITLE 50, UNITED STATES CODE

462. Offenses and penalties

(a) * * *

(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates* or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints,

or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title, or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to [3] exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury.

Exhibit B

[19134]

Congressional Record—House

August 10, 1965

PROHIBITION OF DESTRUCTION OR MUTILATION OF DRAFT CARDS

Mr. RIVERS of South Carolina. Mr. Speaker, I ask unanimous consent that the Committee of the Whole House on the State of the Union be discharged from further consideration of the bill (H.R. 10306) to amend the Universal Military Training and Service Act of 1951, as amended, and for its immediate consideration.

The Clerk read the title of the bill.

The SPEAKER. Is there objection to the request of the gentleman from South Carolina?

There was no objection.

The Clerk read the bill, as follows:

H.R. 10306

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the [19135] Universal Military Training and Service Act, as amended, is hereby further amended as follows:

SECTION 1. Section 12(b)(3) is amended to read as follows:

"(3) who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or".

Mr. GROSS. Mr. Speaker, I move to strike the last word.

I believe we should have an explanation of the bill.

Mr. RIVERS of South Carolina. Mr. Speaker, will the gentleman yield?

Mr. GROSS. I yield to the gentleman from South Carolina.

Mr. RIVERS of South Carolina. Mr. Speaker, the bill, H.R. 10306, amends the Universal Military Training and Service Act to establish a clear statutory provision against a person knowingly destroying or knowingly mutilating a draft card. Existing law provides a penalty for anyone forging or altering a draft card, but there is no specific prohibition against destroying or mutilating a draft card.

The purpose of the bill is clear. It merely amends the draft law by adding the words "knowingly destroys and knowingly mutilates" draft cards. A person who is convicted would be subject to a fine up to $10,000 or imprisonment up to 5 years. It is a straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards.

We do not want to make it illegal to mutilate or destroy a card per se, because sometimes this can happen by accident. But if it can be proved that a person knowingly destroyed or mutilated his draft card, then under the committee proposal, he can be sent to prison, where he belongs. This is the least we can do for our men in South Vietnam fighting to preserve freedom, while a vocal minority in this country thumb their noses at their own Government.

Mr. GROSS. Mr. Speaker, the gentleman from South Carolina in his usual lucid manner has convinced me that this is a very good bill, and I am ready and willing and able to withdraw my reservation.

Mr. BRAY. Mr. Speaker, I move to strike out the last word.

(Mr. BRAY asked and was given permission to revise and extend his remarks.)

Mr. BRAY. Mr. Speaker, the bill that we have before us today is simple and easy to understand. H.R. 10306 is an

amendment to our selective service law providing that it is illegal to knowingly mutilate or destroy a draft card. It is already illegal to alter, forge or change such a card.

The need of this legislation is clear. Beatniks and so-called "campus-cults" have been publicly burning their draft cards to demonstrate their contempt for the United States and our resistance to Communist takeovers. Such actions have been suggested and led by college professors —professors supported by taxpayers' money.

At Rutgers University, Prof. Eugene Geonese [Genovese], who prides himself on being a Marxist, publicly said that he "welcomed a Communist Vietcong victory." The board of governors refused to dismiss him.

Just yesterday such a mob attacking the United States and praising the Vietcong attempted to march on the Capitol but were prevented by the police from forcibly moving into our Chambers. They were led by a Yale University professor. They were generally a filthy, sleazy beatnik gang; but the question which they pose to America is quite serious.

These so-called "student" mobs at home and abroad make demands and threats; they hurl rocks and ink bottles at American buildings; they publicly mutilate or burn their draft cards; they even desecrate the American flag. Chanting and screaming vile epithets, these mobs of so-called "students" and Communist "stooges" attempt to create fear and destroy self-confidence in our country and its citizens and to downgrade the United States in the eyes of the world.

Such organized "student" groups in the United States have sent congratulations and money to Ho Chi Minh and have made anonymous and insulting calls to families of our servicemen killed in Vietnam.

This proposed legislation to make it illegal to knowingly destroy or mutilate a draft card is only one step in

bringing some legal control over those who would destroy American freedom. This legislation, if passed, will be of some assistance to our country if the officers and courts charged with the enforcement of the law will have the energy, courage, and guts to make use of it.

The growing disrespect for our law and institutions in America holds a real threat to our country and to our freedom. Just 5 short years ago no one would have believed that disrespect for our country could have grown to the proportions that it has today.

Disrespect for our American heritage and anti-American demonstrations are all a part of the cold war in some way directed by those who would destroy us. The Communist world is aware that it cannot destroy the effectiveness of the United States by the use of its economic and military strength, because we are far stronger in these fields than it is and we outdistance it more every year.

Then how is the Communist victory to be brought about? The Communists are planning to use the "Judas goats" to lead those who are free to defect from freedom. So-called "students" and Communist stooges here and abroad, by demonstrations of anti-American feeling, by belittling, and by vilification are to downgrade the United States in the eyes of the world and shake the confidence and faith of our citizens in our democratic way of life. They hope to attain victory over freedom by subversion within the United States and by erosion of our national pride and confidence in the greatness of America and our national heritage.

One of America's greatest sources of strength in discouraging these demonstrations is to pause and consider the greatness of America—to appreciate what our country has done for the benefit of mankind. Let us have a rebirth of patriotism. Let us be proud, possessed not of an arrogant pride, but a humble pride in our greatness, in our heritage.

Exhibit B

Aside from becoming the strongest country economically and militarily during the last quarter century, this country, without any desire to gain a square foot of territory, has been the principal force in overthrowing the armed might of Hitler and Japan. The strength of the United States saved both Europe and Asia from the despotic rule of tyrants. We asked nothing in return. We asked no gain for this victory brought about by American dollars, American production, and American youth. The people of the United States have unselfishly contributed more to the feeding, care, welfare, and rehabilitation of the world than has all of the rest of the world combined. All of this has been done without any thought of gain except the reward of the deed itself.

The United States, without hope of personal gain, blocked the Communist takeover of South Korea and today is assuming the major role of blocking Communist slavery in southeast Asia. Yet there are today those in America who are weak at heart, those of little faith in the greatness of America and freedom, those who are naive and refuse to face up to the realities of Communist aggression. There are those who in various degrees and for various reasons ask our Government to yield more and more to Communist aggression.

Our Government, through fear of the public opinion at home and abroad of our enemies, is failing to adequately enforce our laws on subversion and antigovernmental attacks. That is exactly as our enemies have planned it. In the exercise of our great ideals of fairness and tolerance, we seem to forget that it is axiomatic that a government must protect its citizenry against illegal acts and against mob violence. When decent, productive people are forced to support and coddle criminals and other dregs and drones of society, chaos, degradation, and ruin are inevitable.

Tolerance ceases to be a virtue when it condones evil. Governmental tolerance ceases to be a virtue when it allows mob violence on the law-abiding members of its society—when it winks at unlawful disrespect to its institutions and the flag. This is true whether this tolerance is the result of apathy, a maudlin sympathy, or a fear of the opinions of enemies.

When the mob once learns that its actions will lead to granting of its demands and its actions are condoned, there is a multiplication both of its demonstrations, riots, and wanton destruction, and of its demands.

If these "revolutionaries" are permitted to deface and destroy their draft cards, our entire Selective Service System is dealt a serious blow.

Mr. Speaker, I strongly urge all my fellow Members to support this legislation.

[19136] The SPEAKER. The question is on engrossment and third reading of the bill.

The bill was ordered to be engrossed and read a third time and was read the third time.

The SPEAKER. The question is on passage of the bill.

The question was taken.

Mr. HALL. Mr. Speaker, I object to the vote on the ground that a quorum is not present and make the point of order that a quorum is not present.

The SPEAKER. Evidently a quorum is not present.

The Doorkeeper will close the doors, the Sergeant at Arms will notify absent Members, and the Clerk will call the roll.

The question was taken; and there were—yeas 393, nays 1, not voting 40, as follows:

Exhibit B

[Roll No. 230]

YEAS—393

Abbitt
Abernethy
Adair
Addabbo
Albert
Anderson, Ill.
Anderson, Tenn.
Andrews, George W.
Andrews, Glenn
Andrews, N. Dak.
Annunzio
Arends
Ashbrook
Ashley
Ashmore
Aspinall
Ayres
Baldwin
Bandstra
Baring
Barrett
Bates
Battin
Beckworth
Belcher
Bell
Bennett
Berry
Betts
Bingham
Blatnik
Boggs
Boland
Bolling
Bolton
Bow
Bray
Brock
Brooks
Broomfield
Brown, Calif.
Broyhill, N. C.
Broyhill, Va.
Buchanan
Burke
Burleson
Burton, Calif.
Burton, Utah
Byrne, Pa.
Byrnes, Wis.
Cabell
Callan
Callaway
Carey
Casey
Cederberg
Celler
Chamberlain
Chelf
Clancy
Clark
Clausen, Don H.
Clawson, Del.
Cleveland
Clevenger
Cohelan
Collier
Conte
Cooley
Corbett
Corman
Craley
Cramer
Culver
Curtin
Curtis
Daddario
Dague
Daniels
Davis, Ga.
Davis, Wis.
Dawson
de la Garza
Delaney
Dent
Denton
Derwinski
Devine
Dickinson
Dingell
Dole
Donohue
Dorn
Dow
Dowdy
Downing
Dulski
Duncan, Oreg.
Duncan, Tenn.
Dwyer

Dyal
Edmondson
Edwards, Ala.
Edwards, Calif.
Ellsworth
Erlenborn
Evans, Colo.
Everett
Fallon
Farbstein
Farnsley
Farnum
Fascell
Feighan
Findley
Fino
Fisher
Flood
Flynt
Fogarty
Foley
Ford, Gerald R.
Ford, William D.
Fountain
Fraser
Frelinghuysen
Friedel
Fulton, Pa.
Fulton, Tenn.
Fuqua
Gallagher
Garmatz
Gathings
Gettys
Giaimo
Gibbons
Gilbert
Gilligan
Gonzalez
Goodell
Grabowski
Gray
Green, Pa.
Greigg
Grider
Griffin
Griffiths
Gross
Grover
Gubser
Gurney
Hagan, Ga.
Hagen, Calif.
Haley
Hall
Halleck
Halpern
Hamilton
Hanley
Hanna
Hansen, Idaho
Hansen, Iowa
Hansen, Wash.
Hardy
Harris
Harsha
Harvey, Ind.
Harvey, Mich.
Hathaway
Hébert
Hechler
Helstoski
Henderson
Herlong
Hicks
Holifield
Holland
Horton
Howard
Hull
Hungate
Huot
Hutchinson
Ichord
Jacobs
Jarman
Jennings
Joelson
Johnson, Calif.
Johnson, Okla.
Johnson, Pa.
Jonas
Jones, Ala.
Jones, Mo.
Karsten
Karth
Kastenmeier
Kee
Keith
Kelly
King, Utah
Kirwan
Kluczynski
Kornegay

Krebs
Kunkel
Laird
Landrum
Langen
Latta
Leggett
Lennon
Lipscomb
Long, La.
Long, Md.
Love
McClory
McCulloch
McDade
McDowell
McEwen
McFall
McGrath
McMillan
McVicker
Macdonald
MacGregor
Machen
Mackay
Mackie
Madden
Mahon
Mailliard
Marsh
Martin, Ala.
Martin, Mass.
Martin, Nebr.
Mathias
Matsunaga
Matthews
May
Meeds
Michel
Miller
Mills
Minish
Mink
Minshall
Mize
Moeller
Monagan
Moore
Moorehead
Morgan
Morris
Morse
Morton
Mosher
Moss
Multer
Murphy, Ill.
Murphy, N. Y.
Murray
Natcher
Nedzi
Nelsen
Nix
O'Brien
O'Hara, Ill.
O'Hara, Mich.
O'Konski
Olsen, Mont.
Olson, Minn.
O'Neal, Ga.
O'Neill, Mass.
Ottinger
Passman
Patman
Patten
Pepper
Perkins
Philbin
Pickle
Pike
Poage
Poff
Powell
Price
Pucinski
Purcell
Quie
Quillen
Race
Randall
Redlin
Reid, Ill.
Reid, N. Y.
Reifel
Reinecke
Resnick
Reuss
Rhodes, Ariz.
Rhodes, Pa.
Rivers, S. C.
Rivers, Alaska
Roberts
Robison
Rodino
Rogers, Colo.

Rogers, Fla.
Rogers, Tex.
Ronan
Rooney, N. Y.
Rooney, Pa.
Roosevelt
Rosenthal
Rostenkowski
Roudebush
Roush
Rumsfeld
Satterfield
St. Germain
St. Onge
Saylor
Scheuer
Schisler
Schneebeli
Schweiker
Secrest
Selden
Senner
Shipley
Shriver
Sickles
Sikes
Sisk
Skubitz
Slack
Smith, Calif.
Smith, Va.
Springer
Stafford
Staggers
Stalbaum
Stanton
Steed
Stephens
Stratton
Stubblefield
Sweeney
Talcott
Taylor
Teague, Calif.
Teague, Tex.
Tenzer
Thompson, N. J.
Thompson, Tex.
Thomson, Wis.
Todd
Trimble
Tunney
Tuten
Udall
Ullman
Utt
Van Deerlin
Vanik
Vigorito
Vivian
Waggonner
Walker, Miss.
Walker, N. Mex.
Watkins
Watson
Watts
Weltner
Whalley
White, Idaho
White, Tex.
Whitener
Whitten
Widnall
Williams
Wilson, Bob
Wilson, Charles H.
Wolff
Wright
Wyatt
Wydler
Yates
Young
Younger
Zablocki

NAYS—1

Smith, N. Y.

NOT VOTING—40

Adams
Bonner
Brademas
Brown, Ohio
Cahill
Cameron
Carter
Colmer
Conable

Conyers	King, Calif.	Ryan
Cunningham	King, N. Y.	Schmidhauser
Diggs	Lindsay	Scott
Evins, Tenn.	McCarthy	Smith, Iowa
Green, Oreg.	Morrison	Sullivan
Hawkins	Pelly	Thomas
Hays	Pirnie	Toll
Hosmer	Pool	Tuck
Irwin	Roncalio	Tupper
Keogh	Roybal	Willis

So the bill was passed.

The Clerk announced the following pairs:

Mr. Keogh with Mr. Brown of Ohio.
Mr. Roncalio with Mr. Pelly.
Mr. Toll with Mr. Lindsay.
Mr. Colmer with Mr. Carter.
Mr. Roybal with Mr. Hosmer.
Mr. Pool with Mr. Cunningham.
Mrs. Sullivan with Mr. Tupper.
Mr. Thomas with Mr. King of New York.
Mr. Morrison with Mr. Conable.
Mr. King of California with Mr. Pirnie.
Mr. Hays with Mr. Ryan.
Mr. Brademas with Mr. Diggs.
Mr. McCarthy with Mr. Conyers.
Mr. Tuck with Mrs. Green of Oregon.
Mr. Hawkins with Mr. Irwin.
Mr. Smith of Iowa with Mr. Scott.
Mr. Evins of Tennessee with Mr. Adams.
Mr. Cameron with Mr. Bonner.
Mr. Willis with Mr. Schmidhauser.

The result of the vote was announced as above recorded.

The doors were opened.

A motion to reconsider was laid on the table.

Exhibit C

[19012]

Congressional Record—Senate

August 10, 1965

MUTILATION OR DESTRUCTION OF DRAFT CARDS SHOULD BE A CRIMINAL OFFENSE

Mr. THURMOND. Mr. President, recently the public and officials of our country have been appalled by reports of mass public burnings of draft registration cards. It is not fitting for our country to permit such conduct while our people are giving their lives in combat with the enemy.

The law now makes it a criminal offense to forge or alter a draft registration card. Certainly it should be just as serious an offense to mutilate or destroy a draft card.

Last week, the chairman of the Armed Services Committee in the House of Representatives introduced a bill to make the mutilation or destruction of a draft card a criminal offense. In order that this matter may be expedited in the Senate, I send to the desk a similar bill and ask that it be appropriately referred. It is my hope that hearings will be held promptly and expeditiously on this proposal.

The PRESIDING OFFICER. The bill will be received and appropriately referred.

The bill (S. 2381) to amend the Universal Military Training and Service Act of 1951, introduced by Mr. THURMOND, was received, read twice by its title, and referred to the Committee on Armed Services.

Exhibit D

[1]

Senate—Calendar No. 572

89th Congress—*1st Session*

Report No. 589

PROHIBITION OF DESTRUCTION OR MUTILATION OF DRAFT CARDS

AUGUST 12, 1965.—Ordered to be printed

Mr. THURMOND, from the Committee on Armed Services, submitted the following

REPORT

[To accompany S. 2381]

The Committee on Armed Services, to which was referred the bill (S. 2381) to amend the Universal Military training and Service Act, as amended, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

AMENDMENT

The amendment is as follows:

Strike out lines 5 and 6 and substitute in place thereof the following:

SECTION 1. Section 12(b)(3) is amended to read as follows:

Exhibit D

EXPLANATION OF AMENDMENT

The amendment is a technical one to correct the designation of the section to be amended.

PURPOSE

This bill would make a person who knowingly destroys or knowingly mutilates a draft registration card subject to a fine of not more than $10,000 or imprisonment of not more than 5 years, or both.

EXPLANATION OF THE BILL

Section 12(b)(3) of the Universal Military Training and Service Act of 1951, as amended, provides, among other things, that a person who forges, alters, or changes a draft registration certificate is subject to a fine of not more than $10,000 or imprisonment of not more than 5 years, or both. There is no explicit prohibition in this section against the knowing destruction or mutilation of such cards.

[2] The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies.

For a person to be subject to fine or imprisonment the destruction or mutilation of the draft card must be "knowingly" done. This qualification is intended to protect persons who lose or mutilate draft cards accidentally.

CHANGES IN EXISTING LAW

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law proposed to be made by the bill are shown as follows (new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

Exhibit D

SECTION 462(b)(3) OF TITLE 50, UNITED STATES CODE

462. Offenses and penalties

(a) * * *

(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title, or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury.

Exhibit E

[19669]

Congressional Record—Senate

August 13, 1965

AMENDMENT OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT OF 1951, AS AMENDED

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 573, H.R. 10306.

The PRESIDING OFFICER. The bill will be stated by title.

The LEGISLATIVE CLERK. A bill (H.R. 10306) to amend the Universal Military Training and Service Act of 1951, as amended.

The PRESIDING OFFICER. Is there objection to the present consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

Mr. THURMOND. Mr. President, yesterday the Senate Committee on Armed Services unanimously reported Senate bill 2381. H.R. 10306 is identical with S. 2381, as amended. Since the bills are identical, I should like to make a statement on the pending bill.

The bill amends the Universal Military Training and Service Act, which appears in the appendix to title 50 of the United States Code, to include a clear statutory prohibition against any person knowingly destroying or knowingly mutilating a draft card. The existing law already provides prohibition against the altering of a draft card as well as a number of offensives connected with the selective service registration, but there now is no specific prohibition against the willful destruction or mutilation of a draft card.

Recent incidents of mass destruction of draft cards constitute open defiance of the warmaking powers of the Gov-

ernment and have demonstrated an urgent need for this legislation.

The criminal prohibitions instituted by this bill would be limited to willful incidents. The prohibition would not apply to instances where draft cards were destroyed or mutilated by inadvertence.

The President has acknowledged that our country is engaged in a war. Attempts to interfere with the Universal Military Training Act or service in the Armed Forces constitute treason in time of war. Such conduct as public burnings of draft cards and public pleas for persons to refuse to register for their draft should not and must not be tolerated by a society whose sons, brothers, and husbands are giving their lives in defense of freedom and countrymen against Communist aggression.

The PRESIDING OFFICER. The bill is open to amendment. If there be no amendment to be proposed, the question is on the third reading of the bill.

The bill (H.R. 10306) was ordered to a third reading, read the third time, and passed.

Mr. MANSFIELD. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. THURMOND. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. THURMOND. Mr. President, I ask unanimous consent to postpone indefinitely further consideration of Senate bill 2381.

The PRESIDING OFFICER. Without objection, it is so ordered.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA, **MEMORANDUM**

-against- 65 Cr. 937

DAVID J. MILLER,

- - - - - - - - - - - - - - - - - - -X

TYLER, D.J.

This case was tried before the court sitting without a jury on February 9 and 10, 1966. At the conclusion of the trial, the court found David J. Miller guilty as charged in the indictment. In response to an inquiry from the court, defense counsel specifically waived specific findings as provided in Rule 23(c), Federal Rules of Criminal Procedure.

Indeed, the essential facts of what transpired on the day in question, October 15, 1965, at the street rally down near the Army Building at No. 39 Whitehall Street, in the City of New York, are not in dispute. The principal issue in the case was perhaps most aptly summarized by the defendant himself when, in response to a question put by him to his own counsel, he stated as follows:

> "I burned my draft card as a symbolic protest in opposition to conscription, to the Selective Service System, to the war in Viet Nam, and to the draft card burning law itself."

Immediately thereafter, Miller was asked this question and gave the following answer:

> "Q. And this was done in the course of a speech which you were delivering on those subjects?
>
> A. That's correct."

In short, the prime defense raised by the defendant to this charge, prior to, during and after trial, has been the contention that his admitted burning of his draft card was an act of symbolic speech protected in full by the First Amendment to the Constitution. In finding defendant

guilty as charged, this court necessarily passed upon and overruled this defense. The reasons for this court's ruling on this issue may be said to have been adequately set forth in the opinion filed on December 16, 1965 passing upon defendant's various pre-trial motions. In the earlier opinion, for example, it was stated that the authorities cited by defendant are inapposite to the indictment on trial and to the statute on which it is based, Public Law 89-152 of August 30, 1965 (50 U.S.C. Appendix 462(b). E.g. West Virginia State Board of Education v. Barnett, 319 U.S. 624 (1943); Stromberg v. California, 283 U.S. 359 (1931). The evidence adduced at trial does nothing to shake this conclusion. Nonetheless, it might be helpful to sharpen the discussion further and, in particular, to answer the specific arguments of defendant's able counsel as advanced by them after the proofs were completed.

As I understand defense counsel, for example, they respond to the observation that David Miller could have sufficiently expressed his opinion in opposition to conscription, the Selective Service System in general, the war in Viet Nam and the very draft card destruction statute in question without burning his card on the day in question, with the argument that the First Amendment would permit Miller to make the most dramatic and compelling speech possible, such as the symbolic event which he perpetrated, with full immunity from prosecution under this or any other statute. A simple answer to this ingenious argument, it seems to me, is that neither the authorities cited by defense counsel nor any case that I have been able to find support the proposition that the First Amendment entitles one to full protection of the most dramatic form of speech available, especially where other adequate but less dramatic means are at hand to be used by the speaker in question. Another way of putting this would be to say that even if it is assumed arguendo that what Miller did on October 15th last was an act of symbolic communication, any regulation thereof results only in a partial abridgment of his freedom of speech because other or more normal forms of communication were still open to him that day. To bespeak the obvious, he could have spoken

against all of the things he desired without burning his notice of classification. See Stromberg v. California, supra, at page 368; American Communications Association v. Douds, 339 U.S. 382, at page 400 (1950). First Amendment freedoms are not absolute, and their exercise often must give way to clear public or governmental interests. American Communications Association v. Douds, supra, at pages 398-99; Brown v. Louisiana, ---U.S.---, decided February 23, 1966, at page 15 of slip opinion (dissenting opinion by Mr. Justice Black).

As a practical matter, the very evidence of what transpired at the street rally in question on October 15th demonstrates that other methods of speech--though less dramatic and shocking than Miller's action--served as reasonably effective communication of the ideas in question. Although it is true that most of the witnesses at trial agreed that David Miller got the largest proportion of cheers (and boos as well), it also seems to be beyond question that the other speakers obtained applause for their efforts--i.e. they were able to make their points to the crowd assembled--without burning their classification cards, if such they had, or doing any other act sanctioned by a presumptively valid criminal statute. See Giboney v. Empire Storage & Ice Co., 336 U.S. 490, at page 498 (1949).

Miller's counsel also argue that even if the statute be assumed to serve a valid governmental purpose, it is such a limited and largely duplicative weapon in the arsenal of selective service sanctions that the court should strike a balance in favor of any First Amendment rights which happen to be impinged upon by its application. But, as indicated in this court's December 16 opinion, the governmental purpose of this statute is clear enough, and this court cannot and will not substitute its judgment for that of Congress in providing for and preserving an effective means of drafting young citizens for military service. This being so, to strike the balance in favor of Miller would be virtually to license him and others so inclined to ignore their responsibilities to the national defense requirements of this nation.

The defendant will appear for sentencing on March 15, 1966 at 2:15 p.m.

H. R. TYLER, JR.
U.S.D.J.

March 7, 1966.

MAR 2 8 1966

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA, :

-against- : 65 Cr. 937

DAVID J. MILLER, :

Defendant :

- -X

DEFENDANT'S MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS INDICTMENT

INTRODUCTORY STATEMENT

This is a motion to dismiss the indictment pursuant to Rule 12 of the Federal Rules of Criminal Procedure. A copy of the indictment is attached to the motion papers. The grounds for the motion are "the lack of a statute creating the crime" and "the unconstitutionality of the statute relied upon." 8 Moore's Federal Practices P. 12.03(2) (2d Ed. 1965).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

United States Constitution, First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

United States Constitution, Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Eighth Amendment:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

United States Constitution, Ninth Amendment:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

United States Constitution, Tenth Amendment:

"The powers not delegated to the United States by the Constitution, or prohibited by it to the States, are reserved to the States respectively, or to the people?

Title 50, Appendix, United States Code, Section 462(b):

(Language inserted by P.L. 89-152, 79 Stat. 586, amendment to Section 462(b) is underscored).

"(b) Any person (1) who knowingly transfers or delivers to another, for thepurpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title (sections 451-454, 455-471 of this Appendix); or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title (said sections), or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title (said sections) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury."

Title 32, Code of Federal Regulations, Section 1623.6:

"§1623.6 Wrongful possession of, or making, altering, forging, or counterfeiting, Notice of Classification (SSS Form No. 110) prohibited.

"It shall be a violation of these regulations for any person to have in his possession a Notice of Classification (SSS Form No. 110) issued to some other person, or to permit a Notice of Classification (SSS Form No. 110) issued to him to be in possession of any other person except as provided in the instructions upon such form; or to falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or to willingly aid or assist another to falsely make, alter, forge, or counterfeit, any Notice of Classification (SSS Form No. 110), or to utter or publish as true, or cause to be uttered or published as true, or have in his possession with the intent to utter or publish as true, any such false, altered, forged, or counterfeited Notice of Classification (SSS Form No. 110), knowing the same to be false, forged, altered or counterfeited."

ARGUMENT

POINT I

THE INDICTMENT FAILS TO CHARGE A CRIME UNDER TITLE 50, APP. SECTION 462(b) (3) BECAUSE ONLY THE DESTRUCTION AND MUTILATION OF A CERTIFICATE CONSTITUTES A VIOLATION OF SUCH STATUTORY PROVISION, AND A NOTICE OF CLASSIFICATION IS PLAINLY NOT A CERTIFICATE.

The indictment charges destruction and mutilation of "a Notice of Classification (SSS Form No. 10)". The acts of "knowing destruction", or "knowing mutilation", prohibited under Section 462(b) (3) are directed to the destruction or mutilation of "any such certificate". "Such certificate" refers to Section 462 (b) (1) where the subject matter of "certificate" is set forth as follows:

> "any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules and regulations promulgated hereunder;"

A notice of classification is never defined or described as a "certificate" in any of the sections of Title 50, App., or in any of the rules or regulations promulgated thereunder. It is plainly not a "Registration Certificate", 32 C.F.R. §1617.1,

et seq. Just as plainly, it is not "any other certificate" issued or prescribed by the statute or regulations. The "other" certificate refers to a "certificate recording proficiency and merit", issued upon satisfactory completion of training and service, i.e., a discharge certificate, provided for by Section 459 (a). There do not appear to be any other provisions in the Title or regulations respecting the issuance of certificates.

Unlike a Registration Certificate, or a Certificate of Satisfactory Completion of Service, a Notice of Classification does not, by its own terms, purport to "certify" anything. Registration Certificates and Certificates of Service not only are labeled as "certificates", but also state "This is to certify...."

The reason for the distinction is simple enough. The purpose of a Registration Certificate or Certificate of Service is to provide solemn documentary evidence to the whole world of a permanent fact, that a person has registered, or that he has served. The purpose of the Notice of Classification is merely to inform the registrant of his classification status, a status which is frequently changing, and always subject to change. "No classification is permanent". 32 C.R.F. §1625.1. A very considerable portion of the regulations is devoted to the procedures of classification and changes in classification. See 32 C.F.R. Parts 1621-1628, passim, and particularly Part 1625. Cf. 32 C.F.R. §1623.5, which specifies a "valid" Notice of Classification, implying that a superseded Notice of Classification is of no legal effect.

In the Selective Service scheme there are surface similarities between a Registration Certificate (SSS Form 2) and a Notice of Classification (SSS Form 110). Both, for example, are issued on forms and both are required to be kept in personal possession at all times and delivered up to and destroyed by the commanding officer when report is made for active duty. 32 C.F.R.

et seq. Just as plainly, it is not "any other certificate" issued or prescribed by the statute or regulations. The "other" certificate refers to a "certificate recording proficiency and merit", issued upon satisfactory completion of training and service, i.e., a discharge certificate, provided for by Section 459 (a). There do not appear to be any other provisions in the Title or regulations respecting the issuance of certificates.

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§§1617.1, 1623.5. But the scheme itself recognizes that a Notice of Classification is not a certificate in more important ways. The procedures for determining upon a classification, or change in classification, and notifying the registrant thereof via Notice of Classification are completely different from the procedures involved in the issuance of a Registration Certificate. Compare 32 C.F.R. §§1611.1, et seq. Particularly distinctive is the requirement of Section 1613.14, providing for certification by registrar, which has no parallel in the issuance of a Notice of Classification.

The most important administrative recognition of the fact that a Notice of Classification is not a certificate is found in 32 C.F.R. §1623.6, entitled "Wrongful possession of, or making, altering, forging or counterfeiting Notice of Classification (SSS Form No. 110) prohibited." The prohibitions contained in this regulation with respect to the Notice of Classification are almost identical with the prohibitions set down in Section 462(b) of the statute with respect to "certificates".

There is no comparable regulation dealing with registration certificates. It cannot be presumed that official action taken in the issuance of a regulation of this significance was an exercise in redundancy. Quite the contrary; it must be presumed that the administrative action was designed to add something the statute did not provide for. The plain purpose of 32 C.F.R. §1623.6 was to prohibit certain acts with respect to a Notice of Classification which were already prohibited -- by the statute -- with respect to certificates. And the only logical reason for the regulation is that a Notice of Classification is not covered by the statute because it is not a certificate. If a Notice of Classification were a certificate, there would have been no reason for the regulation.

Generally speaking, a "certificate" means:

> "A written assurance, or official representation, that some act has or has not been done, or some event occurred, or some legal formality has been complied with."
> Black's Law Dictionary, p. 285 (4th Ed. 1951)

To certify is:

> "To testify in writing; to make known or establish as a fact ....To warrant."
> Black's Law Dictionary, p. 287 (4th Ed. 1951)

A "notice", however, is something less. It is:

> "Information; the result of observation, whether by the senses or the mind; knowledge of the existence of a fact or state of affairs; the means of knowledge."
>
> * * *
>
> "In another sense, 'notice' means information an advice, or written warning, in more or less formal shape, intended to apprise a person of some proceeding in which his interests are involved, or informing him of some fact which it is his right to know and the duty of the notifying party to communicate."
> Black's Law Dictionary, p. 1210 (4th Ed. 1951)

As noted above, the solemnizing aspects associated with a certificate are typically absent from a notice. The common-sense meaning is that any communication of information is a "notice", while a great deal more is needed for something to be "certified".

Furthermore, a certificate implies a certain mutual acknowledgement by both the certifying party and the certificate holder, that the facts so certified are true. A certificate is neutral. It does not customarily invite any response.

A notice, on the other hand, states a legal position, and invites response, lest that claim or contention which is the subject of the notice ripen into full force and effect. A notice may be likened to a pleading in a civil action. In default of any response thereto, that which is alleged will be deemed established. But if it is contested or challenged, after the contest is over, a new notice will be mailed, which is again subject to either acquiescence or challenge.

The inapplicability of the prohibition of Section 462(b) (3) to Notices of Classification is borne out not only by the Selective Service scheme, and by the plain meaning of the words, but also by legislative history. Congress only intended to prohibit the

destruction or mutilation of Registration Certificates.

There is no mention of Notices of Classification in the Congressional history. House Report No. 747 speaks of the prohibition applying to a "draft registration card" and uses the term "draft card" synonymously with the registration card. Senate Report No. 589 refers to "a draft registration card" or "a draft registration certificate" or "draft cards". In the floor speeches Senator Thurmond referred to "draft cards" and "draft registration cards". Congressional Record, 19012, 19669; Congressman Rivers and Bray spoke of "draft cards". Congressional Record, 19135.

In defendant's view, the difference between a Registration Certificate and a Notice of Classification is so conspicuous and inescapable, that the indictment must be dismissed for failure to charge an offense. This is almost a classical case of "the lack of a statute creating the crime." 8 Moore's Federal Practice para. 12.03(2) (2d Ed. 1965). "There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." Fasulo v. U.S., 272 U.S. 620, 629 (1926).

But even if there is some doubt in the Court's mind, it is submitted that this doubt must be resolved in favor of the defendant, in keeping with the fundamental due process principle that "Criminal statutes are to be strictly construed", Yates v. U.S., 354 U.S. 298, 310 (1957); F.C.C. v. American Broadcasting Co., 347 U.S. 284, 297 (1954).

This principle forbids punishment of "a crime not enumerated in the statute, because it is one of equal atrocity, or of kindred character, with those which are enumerated." The quoted words are those of Chief Justice Marshall in U.S. v. Wiltberger, 5 Wheat. 76, 95-96 (1820), reiterated and reaffirmed by Mr. Justice Harlan, writing for the Court in Yates v. U.S., supra, at 304-305.

POINT II

THE PROHIBITION IN TITLE 50, APP. U.S.C. §462(b) (3) AGAINST KNOWING MUTILATION AND DESTRUCTION OF A REGISTRATION CERTIFICATE UNCONSTITUTIONALLY ABRIDGES THE RIGHTS TO FREEDOM OF SPEECH AND ASSEMBLY AND TO THE FREE EXERCISE OF POLITICAL RIGHTS AS GUARANTEED BY THE FIRST, NINTH AND TENTH AMENDMENTS.

A. The Constitutional Restriction on Congressional Power.

It is fundamental that Congress has no power to prohibit non-violent speech advancing a lawful purpose. "Congress shall make no law...abridging the freedom of speech...." U.S. Constitutiona, First Amendment. The peaceful expression of unpopular views cannot be made criminal by Congressional fiat, New York Times Co. v. Sullivan, 376 U.S. 255 (1964); Edwards v. South Carolina, 372 U.S. 229 (1963); N.A.A.C.P. v. Button, 371 U.S. 415 (1963); Terminiello v. Chicago, 337 U.S. 1 (1949); Thomas v. Collins, 323 U.S. 516 (1945); Cantwell v. Connecticut, 310 U.S. 296 (1940); Herndon v. Lowry, 301 U.S. 242 (1937).

Political speech criticizing the conduct of foreign and military policy of the Federal Government is entitled to the highest degree of protection under the First Amendment. Bridges v. California, 314 U.S. 252 (1941); DeJonge v. Oregon, 299 U.S. 353 (1937); Stromberg v. California, 283 U.S. 359 (1931). Speech of dissent and criticism is constitutionally protected as a mechanism for correcting and testing the validity of governmental action. In the words of Justice Holmes:

> "...when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas, - that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is

part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

Abrams v. United States, 250 U. S. 616, 630 (1919) (Dissenting Opinion)

An equally classic rationale for the First Amendment's scope of protection was given by Justice Brandeis in Whitney v. California, 274 U. S. 357, 375-376, 377 (Concurring Opinion):

" Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace of freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

* * *

" Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore, always open

to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it."

Chief Justice Hughes, speaking for the Court, in Stromberg v. California, supra, wrote;

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our Constitutional System."
> (Id. at 369)

In addition to the well-established and oft-reiterated gurantees of the First Amendment, the right of political expression -- and the correlative right to be free of political suppression -- is likewise guaranteed by the Ninth and Tenth Amendments. United Public Workers v. Mitchell, 330 U.S. 75, 94 (1947). See Griswold v. Connecticut, 381 U.S. 479, 486-499 (1965) (Concurring Opinion, Goldberg, J.) Surely the right to express one's opinion on foreign policy via a peaceful combination of verbal and symbolic speech is at least as much "a personal right 'retained by the people' within the meaning of the Ninth Amendment" as is the right to privacy. Griswold v. Connecticut, supra.

B. The Form of Speech.

Under the First Amendment, symbolic speech is entitled to the same degree of protection as verbal speech. Symbolic speech is "a primitive but effective way of communicating ideas *** (it) is a short cut from mind to mind ... A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 632-633 (1943). Just as the punishing of a refusal to engage in symbolic speech via compulsory flag salute has been condemned, West Virginia v. Barnette, supra, the free expression of symbolic speech has been upheld. Garner v. Louisiana, 368 U.S. 157, 201 (1961) (sit-in demonstration "is

as much a part of the 'free trade in ideas' (citing Holmes dissent in Abrams v. U.S., 250 U.S. 616, 630) as is verbal expression", Harlan, J., concurring); Thornhill v. Alabama, 310 U.S. 88 (1940) (picketing); Stromberg v. California, 283 U.S. 359 (1931) (red flag display).

It is clear that Congress could pass no law which by its express terms provided, "Any speech which criticizes, attacks, or mocks the Federal government's efforts in Vietnam shall be punished, etc..." Nor could Congress provide that, "Any speech contemptuous of the United States and the United States' resistance to Communist take-overs shall be punished, etc..." Nor could Congress provide that "Any speech where the speaker announces that he will refuse to serve in the armed forces, or otherwise expresses defiance of the authority of the Federal government shall be punished, etc..."

The form of expression is not the critical element. It does not matter whether the expression is through verbal symbols or through non-verbal ones. The First Amendment protection extends to both forms. It is therefore clear that when Congress cannot prohibit the content expressed by certain verbal symbols or words, it cannot prohibit the expression of the same content by means of non-verbal symbols. Speech critical of government policy, whatever its characterization -- defiant, contemptuous, or mocking -- cannot be prohibited, no matter what its form of expression, so long as its form is a peaceful one.

If a Selective Service registrant, addressing a public meeting criticizing the government's foreign policy, held aloft his Registration Certificate, and said words to the effect of "I detest and execrate this piece of paper and everything for which it stands", surely the attempted punishment of such verbal action would be beyond Constitutional limits. It is submitted that insofar as concerns Congressional power under the

First Amendment, the symbolic expression of destroying or mutilating the piece of paper in such a context creates no constitutionally-significant difference.

All these considerations are basic to the First Amendment guarantees of free speech. Yet in utter disregard of these considerations, and indeed, in spite of them, Congress, in 1965, amended Title 50, App. U.S.C. §462(b) (3) for the express purpose of suppressing speech critical of the conduct of government foreign policy.

C. Statutory Purpose.

Title 50, App. U.S.C. §462(b), prior to the 1965 amendment, was a statute which sought to prevent fraud in the operation of the Selective Service Registration System. Each subdivision, save the last, was directed at preserving the integrity of the honest administration of the registration scheme. Subsection 6 was left as an open-ended provision, inviting the issuance of regulations, consonant with the main and primary purpose of the subsection (b). The statutory purpose of preventing fraud is derived from the plain meaning of the subsection's provisions.

In 1965, subsection (3) was amended by the insertion of four words: "knowingly destroys, knowingly mutilates". The insertion of these four words serves no fraud prevention purpose. Indeed, so jarring is the insertion, that the meaning of the amendment's purpose cannot be derived from its statutory context. It can only be understood in light of current events and the amendment's legislative history.

When the statutory purpose is unclear, and its terms apparently innocuous, reference to the legislative history, and the historical setting in which it was enacted becomes relevant. Grosjean v. American Press Co., 297 U.S. 233, 250 (1936); cf. Gomillion v. Lightfoot, 364 U.S. 339 (1960); N.A.A.C.P. v. Alabama, 357 U S. 449 (1958); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

In Grosjean, a newspaper advertising tax statute enacted by the Louisiana Legislature, apparently innocent and innocuous on its face, was held as unconstitutional violation of First Amendment rights. When it appeared that the tax was designed to reach large city newspapers of substantial circulation, but not rural newspapers of lesser circulation, Mr. Justice Sutherland, for a unanimous court, held that the tax is unconstitutional:

> "...because in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of its constitutional guarantees." (Ibid)

It is certainly judicially noticeable that the United States Government, during the course of the last several years, has become increasingly militarily-committed to greater and greater involvement in the conflict which now envelops Vietnam. The Government's military commitment in this area of the world represents a major foreign policy decision. As in the development of any significant course of governmental conduct, the growth of our commitment in Vietnam has occasioned sharp criticism by groups and individuals opposing the Government's policies. Whenever there has occurred the exercise of substantial federal power, particularly in connection with foreign military operations, there is bound to be criticism of its exercise. It is no different today than it was in 1812, 1898, 1914 or 1941.

The manner of opposition to governmental policy in Vietnam has found expression in classic forms: speeches, vigils, marches, writings, and petitions. New methods of expression have also been used: teach-ins, and the symbolic burning of Selective Service Registration Certificates.

This then is the historical setting in which the amendment was enacted. The legislative history of the amendment clearly reflects this setting and demonstrates that the purpose

of the amendment was to suppress speech critical of governmental foreign policy.

D. Legislative History.*

On August 5, 1965, Representative L. Mendel Rivers (Dem.-S.C.) introduced H.R. 10306 providing for the amendment of §12(b)(3) of the Universal Military Training and Service Act of 1951, Title 50, App. U.S.C. §462(b)(3), as follows:

> "(3) who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon;" (Proposed amendment underscored).

On August 9, 1965, H.R. 10306 was favorably reported to the Committee of the whole House by the House Committee on Armed Services and Representative Rivers submitted House Report No. 747, 89th Congress, 1st Session in connection with the bill. (Exhibit A). The House Report states that the amendment is not intended to protect against the destruction of government property, but rather to suppress open defiance of governmental authority:

> "The House Committee on Armed Services is fully aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidence in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards.

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* On the importance of legislative materials in determining statutory purpose, see Galvan v. Press, 374 U.S. 522, 526-8 (1954) (sponsor, floor debates, subsequent memorandum of sponsor as "weighty gloss"); NLRB v. Denver Building & Construction T. Council, 341 U.S. 675, 686-9 (1951 (sponsor, Conference Report); Elder v. Brannan, 341 U.S. 277, 284-6 (1951) (author, Committee Chairman, Reports, Hearings); Ahrens v. Clark, 335 U.S. 188, 191-192 (1947) (Senate Manager, floor discussion); Federal Trade Commission v. Raladam Co., 283 U.S. 643, 648 (1931) (entire Congressional history).

"While the present provisions of the Criminal Code with respect to the destruction of Government property may appear broad enough to cover all acts having to do with the mistreatment of draft cards in the possession of individuals, the committee feels that in thepresent critical situation of the country, the acts of destroying or mutilating these cards are offenses which pose such a grave threat to the security of the Nation that no question whatsoever should be left as to the intention of the Congress that such wanton and irresponsible acts should be punished."

On August 10, 1965, Representative Rivers, speaking in the House in support of the bill, stated:

"The purpose of the bill is clear. It merely amends the draft law by adding the words 'knowingly destroys and knowingly mutilates' draft cards. A person who is convicted would be subject to a fine up to $10,000 or imprisonment up to 5 years. It is a straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards.

"We do not want to make it illegal to mutilate or destroy a card per se, because sometimes this can happen by accident. But if it can be proved that a person knowingly destroyed or mutilated his draft card, then under the committee proposal, he can be sent to prison, where he belongs. This is the least we can do for our men in South Vietnam fighting to preserve freedom, while a vocal minority in this country thumb their noses at their own Government."
(Congressional Record - House, August 10, 1965, at 19135) (Exhibit B).

Representative Bray (Rep.-Ind.), in support of the bill, eloquently delineated its purpose: it was to suppress expressions of contempt for the United States, to punish those who disrespect American institutions, to facilitate a rebirth of patriotic sentiment, and to end toleration of evil. In the words of the Congressman:

"The need of this legislation is clear. Beatniks and so-called 'campus-cults' have been publicly burning their draft cards to demonstrate their contempt for the United States and our resistance to Communist takeovers. Such actions have been suggested and led by college professors -- professors supported by taxpayers' money."

* * * *

"These so-called 'student' mobs at home and abroad make demands and threats; they hurl rocks and ink bottles at American buildings; they publicly mutilate or burn their draft cards; they even desecrate the American flag. Chanting and screaming vile epithets, these mobs of so-called 'students' and Communist 'stooges' attempt to create fear and

destroy self-confidence in our country and its citizens and to downgrade the United States in the eyes of the world.

"Such organized 'student' groups in the United States have sent congratulations and money to Ho Chi Minh and have made anonymous and insulting calls to families of our servicemen killed in Vietnam.

"This proposed legislation to make it illegal to knowingly destroy or mutilate a draft card is only one step in bringing some legal control over those who would destroy American freedom. This legislation, if passed, will be of some assistance to our country if the officers and courts charged with the enforcement of the law will have the energy, courage, and guts to make use of it.

"The growing disrespect for our law and institutions in America holds a real threat to our country and to our freedom. Just 5 short years ago no one would have believed that disrespect for our country could have grown to the proportions that it has today."

* * * *

"One of America's greatest sources of strength in discouraging these demonstrations is to pause and consider the greatness of America -- to appreciate what our country has done for the benefit of mankind. Let us be proud, possessed not of an arrogant pride, but a humble pride in our greatness, in our heritage."
(Exhibit B, Id. at 19135).

Without benefit of any additional debate (save the comments of Congressman Rivers and Bray), on August 10, 1965, with 393 yea votes against a solitary negative, the bill passed the House.

On that same day Senator Strom Thurmond (Rep.-S.C.), introduced an identical bill in the Senate, and stated:

"Mr. President, recently the public and officials of our country have been appalled by reports of mass public burnings of draft registration cards. It is not fitting for our country to permit such conduct while our people are giving their lives in combat with the enemy."
(Congressional Record - Senate, August 10, 1965, at 19012) (Exhibit C).

On August 12, 1965, with a technical amendment as to section numbering, the Senate Committee on Armed Services favorably reported the proposed amendment and submitted Senate Report No. 589, 89th Congress, 1st Session (Exhibit D) in support of the bill. The Committee explained that the bill was directed

at political dissenters. It stated:

> "The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies."

On August 13, 1965, Senator Thurmond remarked on the Senate floor:

> "Recent incidents of mass destruction of draft cards constitute open defiance of the warmaking powers of the Government and have demonstrated an urgent need for this legislation."
>
> * * * *
>
> "Such conduct as public burnings of draft cards and public pleas for person to refuse to register for their draft should not and must not be tolerated by a society whose sons, brothers, and husbands are giving their lives in defense of freedom and countrymen against Communist aggession."

(Congressional Record - Senate, August 13, 1965, at 19669) (Exhibit E).

With no more before it than the Senate Committee Report, and the pithy statements of Senator Thurmond, the greatest deliberative body in the world passed the bill without objection on August 13, 1965. (Ibid.)

Thus, within the space of eight days, without hearings, with two short Committee Reports and with floor statements by two Representatives and one Senator, the amendment was literally hurried through Congress. Fifteen days later, on August 30, 1965, H.R. 10306 received Presidential approval and became Public Law 89-152, 79 Stat. 586.

It would be hard to find a statute, whose legislative history more succinctly and unanimously sets forth the purpose sought to be achieved. The evil at which the statute is directed is "open defiance" and "contempt" for governmental authority expressed by "dissident persons who disapprove of national policy". A more obviously illegitimate purpose could hardly be devised. See Grosjean v. American Press Co., supra, and accompanying discussion at page 20 of this memorandum. The legislative

history bears all the hallmarks of a frenzied rush to suppress dissent. There was no free and fearless debate, no sober reflection and reasoning heard in the halls of Congress. There was only a single point of view expressed, and it went unchallenged except for one solitary, albeit unexplained, negative vote.

Unanimity of viewpoint, hurried enactment, and imposition of heavy criminal punishment for political dissent emblazon the amendment with the typical characteristics of oppression. Furthermore, the statute's purpose is superficially and clumsily disguised, so as to present the appearance, despite its unconstitutional purpose, of innocuous legitimacy. It wears the dress of innocent language in transparent attempt to avoid the broad proscriptions of the First Amendment.

This is hardly the first instance recorded in American jurisprudence where reprehensible and unconstitutional laws have been enacted under a hypocritical cloak of propriety. The English sought to suppress the American colonists' speech, not directly, but through stamp taxes. See Grosjean v. American Press Co., supra. States have sought to curtail civil rights activity, not directly, but through improper prosecutions, see Cox v. Louisiana, 379 U.S. 536 (1965); or through corporate registration schemes, see N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958). Illustrations of attempted repression by indirection are, unfortunately, numerous, ranging from anti-Negro grandfather clauses, Lane v. Wilson, 307 U.S. 268 (1939); to anti-oriental laundry ordinances, Yick Wo v. Hopkins, 118 U.S. 356 (1886); to "white only" membership qualifications, Nixon v. Condon, 286 U.S. 73 (1932).

But the devious manner in which the statute achieves its illegitimate end does not render its objective any less invalid. To paraphrase Justice Frankfurter: The First Amendment "nullifies sophisticated as well as simple minded modes of" suppressing speech. Lane v. Wilson, supra.

E. Conclusion.

A statute which expressly prohibits the right to express political dissent would admittedly violate the First Amendment. It would be a palpable incongruity, it is respectfully submitted, to uphold a statute which achieves the same result because accomplished under another guise. "It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence." Frost & Trucking Co. v. Railroad Comm., 271 U.S. 583, 594 (1926); Gomillion v. Lightfoot, 364 U.S. 339, 345 (1960).

POINT III

THE INDICTMENT, INSOFAR AS IT CHARGES A VIOLATION OF TITLE 50, APP. U.S.C. §462 (b)(3), VIOLATES DEFENDANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BECAUSE SUCH STATUTE SERVES NO LEGITIMATE LEGISLATIVE PURPOSE.

In Nebbia v. New York, 291 U.S. 502 (1934), the Supreme Court enunciated the rule that legislation must bear "a reasonable relation to a proper legislative purpose" if it is to satisfy the requirements of due process of law. It is defendant's contention that the legislation under which he was indicted does not meet this constitutional standard of substantive due process.

Presumably, Title 50, App. U.S.C. §462(b)(3) was enacted pursuant to the war powers delegated to Congress in the Federal Constitution. Substantive due process, however, imposes "a limitation upon all power of Congress, even the war power... Galvan v. Press, 347 U.S. 522, 530 (1954)." It forbids construing a law in such a way that it attempts to reach a valid objective by means which are arbitrary or not reasonably related to that objective. Bolling v. Sharpe, 347 U.S. 497 (1954); Detroit Bank v. United States, 317 U.S. 329, 338 (1943); Currin v. Wallace, 306 U.S. 1, 14 (1939); United States v. Carolene Products, 304 U.S. 144, 152-154 (1938; Steward Machine Co. v. Davis, 301 U.S. 548, 584 (1937); Railroad Retirement Board v. Alton R. Co., 294 U.S. 330, 347 (1935).

Although war powers are broad, legislation enacted under such powers has been sustained in cases where the courts have found a persuasive, rational relationship between the enactment and the economic and military conditions of war preparedness. See, e.g., Arver v. United States, 245 U.S. 366 (1918) (enactment of Selective Service legislation); Yakus v. United States, 321 U.S. 414 (1944) (authority to prescribe commodity prices); Bowles v. Willingham, 321 U.S. 503 (1944) (authority to prescribe maximum rents); Lichter v. United States, 334 U.S. 742 (1948) (renegotiation of profits from war contracts); Woods v. Miller, 333 U.S. 138 (1948) (rent control). In all of these cases, the legislation was essential either to increase the size of our armed forces or to make our economic resources available for the war effort.

A close scrutiny of Section 462(b)(3) will indicate that it bears no legitimate relationship to such war powers. In the instant case, the destruction of a draft card or other certificate by its bearer, in no way affects the economic or military capabilities of the United States. It is common knowledge that the Selective Service System, through the local boards, and various City, State and National Headquarters, maintains extensive records of each male American citizen. Perhaps the destruction of these records might endanger national security. To punish an individual citizen who destroys his own certificate is to strike at conduct which is entirely too remote from the waging of and preparation for war.

The legislation was not sought by the Selective Service System. There were no hearings, and there is no indication in the legislative history that the views of the Selective Service System were solicited, or even of any concern to those who pushed through the amendment. Indeed, such evidence as there is of the views of the Selective Service System is that the legislation was completely unnecessary for the operation of the

System. See Philadelphia Evening Bulletin, October 29, 1965, p. 5, reporting speech by Lt. Gen. Lewis B. Hershey, Director of the System, where the General is reported to have stated that the law was not necessary.

The due process clause of the Fifth Amendment limits the power of the United States Government. Bolling v. Sharpe, supra. As pointed out in Carolene Products, supra, and as held in Bolling, supra, the Government is confined to much stricter standards in satisfying this precept of due process where the conduct sought to be regulated affects "a specific prohibition of the Constitution, such as those in the first ten amendments...." Carolene, n. 4, supra, at 152. See Ex Parte Endo, 325 U.S. 283, 299-300 (1944). This being so, the enactment of penal legislation under color of the war power which bears no reasonable relation to the purpose of the war power is violative of due process. Therefore, the indictment must be dismissed.

POINT IV

THE INDICTMENT VIOLATES DEFENDANT'S RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, INSOFAR AS IT IS BROUGHT PURSUANT TO 50 APP., U.S.C. §462(b)(3), BECAUSE IT SUBJECTS THE DEFENDANT TO FELONY PUNISHMENT, SUCH PUNISHMENT FOR THE ACTS CHARGED BEING SHOCKINGLY CRUEL, UNUSUAL AND INHUMANE.

The statute under which the defendant has been indicted subjects him to a maximum penalty of five years imprisonment and $10,000 fine. 50 App., U.S.C. §462(b). This is felony punishment, since it provides for a term of imprisonment exceeding one year. Title 18, U.S.C. §1. By classifying violation of the statute as a felony, Congress has subjected the defendant to the loss of any number of rights. A conviction of a felony can bring certain disabilities, such as the loss of the elective francise and the right to hold office. See, e.g., New York Election Law, §152(4).

Even if the defendant received a suspended sentence, conviction could nevertheless open the door to additional punishments, because he had acquired the "status" of a felon. Furthermore, many communities require felons to register. Lambert v. People of the State of California, 355 U.S. 225 (1957).

Chief Justice Warren has explained the meaning of the Eighth Amendment in Trop v. Dulles, 356 U.S. 86, 101 (1958):

> "The Eighth Amendment punishing cruel and unusual punishment draws its meaning from the evolving standard of decency that marks the progress of a maturing society.
>
> "The exact scope of the constitutional phrase 'cruel or unusual' has not been detailed by the court but the basic policy is reflected in the Anglo-American tradition of criminal justice."

In 1910, the then prevalent "standard of decency" compelled the striking down of a statute prescribing 12 to 20 years imprisonment for the entry of known false statements in a public record. Weems v. United States, 217 U.S. 349 (1910). Cf. State ex rel Garvey v. Walker, 48 La. Am. 527, 19 So. 457 (1896) (six years imprisonment for illegally picking flowers in a public park voided as cruel and unusual punishment because it shocked the conscience of the court); see People v. Elliott, 272 Ill. 592, 112 N.E. 300 (1916) (where penalty is shockingly disproportionate to offense, law is void on its face, and evil cannot be cured by modification of sentence on appeal.)

By 1947, the prevalent "standard of decency" had so evolved that four Justices of the Supreme Court held it would be cruel and unusual punishment to subject a capital convict to a second attempt at electrocution, the first having failed. Louisiana ex rel Francis v. Resweber, 329 U.S. 459 (1947). We may relfect as to whether this view of the Eighth Amendment would not command a majority of the present Supreme Court.

Although the Supreme Court has not definitely spoken since Weems, a number of recent decisions have provided some insights. Thus, in Trop v. Dulles, supra, Mr. Justice Brennan's concurring opinion condemns punishment which he finds to be nothing "other than forcing retribution from the offender --

naked vengeance." (Id. at 112). And in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 187 (1963), Justice Brennan restated his view that punishment was cruel and unusual, in violation of the Eighth Amendment, where it does not have a "rational or necessary connection" with the substantive evil at which it is presumably directed.

In Robinson v. California, 370 U.S. 660, 667 (1962), the Supreme Court had before it a conviction under a California statute which made it a criminal offense for a person to be addicted to the use of narcotics. The defendant was convicted, after police found signs on his body of needle marks, and sentenced to a term of imprisonment of no less than ninety days. Justice Stewart, for the majority, said:

> "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel of unusual, But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."

In determining a contemporary "standard of decency" in Eighth Amendment terms, it will be helpful to compare the statute which is the subject of this indictment to the similar statutory provisions governing alien registration certificates. Had the defendant been an alien, rather than an American citizen, and had he been accused of destroying an alien registration certificate, rather than a Selective Service System registration certificate, he would have been subject to disproportionately different punishment. Conviction of failure to possess an alien registration certifcate is a misdemeanor carrying a maximum sentence of thirty days imprisonment and/or $100 fine. Immigration and Nationality Act of 1952, §264(c); 8 U.S.C. §1304(8). (Similar misdemeanor punishment involving a maximum penality of $100 and/or thirty days imprisonment is imposed for mutilation or defacement of the United States flag; 4 U.S.C. §3). An alien who wilfully fails to register, still a mis-

demeanor, is subject to a maximum sentence of six months imprisonment and/or $1,000 fine. Ibid., §266(a); 8 U.S.C. §1306(a). Only if the defendant has been found guilty of counterfeiting alien registration certificates, can he receive the felony punishment of up to five years imprisonment and/or $5,000 fine. Ibid., §266(d); 8 U.S.C. §1306(d).

Prior to the introduction into the statute of the language which is the subject of this indictment, the evil to which the statute seemed to be directed was the act of making an alteration or change in the registration certificate. There are acts akin to counterfeiting or similar fraudulent behavior. Thus, until the words "knowingly destroyed", "knowingly mutilated" were added, there was little distinction in penalties between acts of counterfeiting and fraud in connection with alien registration certificates, and similar acts in connection with Selective Service System registration certificates.

It may be arguable that a five year penalty is not inappropriate for counterfeiting or similar fraudulent act in connection with a certificate issued by a government agency. But the acts charged by this indictment, under this statute have nothing to do with counterfeiting, fraud, stealth, deceit, misrepresentation, or any other attempt to inveigle the Government, or its agents, or to secure, through such means, status, rights or privileges to which one is not otherwise entitled.

In the light of the legislative history, and the all-too-obvious Congressional purpose of seeking to stifle dissent, it is plain that this defendant is subjected to serious felony punishment for an act which, even if held to be within Congress' constitutional power, is considerably less heinous than the acts proscribed by the statute prior to the amendment. Such punishment, it is submitted, is shockingly cruel, unusual and inhumane. It does not, in the words of the Supreme Court,

comport with "the evolving standards of decency that mark the progress of a maturing society". Trop v. Dulles, supra, at 101. Such punishment does not meet these standards because it is "so disproportionate to the offense committed as to shock the moral sense of the community..." 21 Am. Jur. 2d 564 (citing Weems v. U.S., supra; Roberts v. Warden of Md. Penitentiary, 206 Md. 246, 111 A. 2d 597 (1955); State v. Evans, 73 Idaho 50, 245 p. 2d 788 (1953); Weber v. Commonwealth, 303 Ky. 56, 196 S.W. 2d 465 (1946); Cox v. State, 203 Ind. 550, 181 N.E. 469 (1931). See Rudolph v. Alabama, 375 U.S. 889 (1963), opinion by Mr. Justice Goldberg (joined in by Mr. Justice Douglas and Mr. Justice Brennan) dissenting from denial of certiorari and arguing that certiorari should have been granted to consider, inter alia, whether death penalty for rape violates " 'evolving standards of decency'..." (Id. at 390).

CONCLUSION

Defendant's motion should be granted. The indictment should be dismissed.

Respectfully submitted,

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"SELECTIVE CONSCIENTIOUS OBJECTION"

(for the April 1966 issue of SOCIAL ACTION)

by

John de J. Pemberton, Jr.
Executive Director, American Civil Liberties Union

I.

Our country has fairly consistently made provision, in the raising of armies to conduct its wars, for some exemption of conscientious objectors to participation in war. By the time of the Civil War the pattern that had developed among the states, which until then did the conscripting of men for our armed forces, normally exempted members of the historic peace churches only, and then usually subject to a substitution system that would offend today's conceptions of justice as severely as would the drafting of pacifists. The federal law that took over the business of conscription in 1863, and the practices of the confederacy during the Civil War, adopted this pattern of exempting members of pacifist sects. A half century later the Draft Act of 1917 similarly exempted only conscientious objectors who were affiliated with "a well recognized religious sect or organization . . . whose existing creed or principles [forbade] its members to participate in war in any form . . .". But in January, 1918, the Secretary of War enlarged the narrow class thus exempted by instructing that "personal scruples against war" should be considered as constituting "conscientious objection". Under the 1917 law, exempted objectors were inducted into the armed services and then permitted to perform noncombatant service.

It was the 1940 Selective Training and Service Act in which Congress first gave statutory recognition to the claim of conscientious objection on the part of persons not members of one of the traditional pacifist sects. The 1940 Act extended the exemption to all whose opposition to "war in any form" was based on "religious training in belief." It permitted objectors to engage in "civilian work of public importance" without induction into the armed forces as well as to be inducted for noncombatant service only.

When it re-enacted the Selective Service Act in 1948, Congress added a statutory definition of the words "religious training and belief" required to entitle an objector to exemption. To be religious, Congress provided, it must involve "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." Although the committee reports suggested that the additional language merely codified the old law

as interpreted by the courts, the reference to a "Supreme Being" was widely viewed as confining the exemption to believers in a theistic religion. Even more clearly the law appeared to exclude persons who did not call their beliefs "religious", however deeply they may have held them.

Thus, for the Supreme Court to decide in the case of United States v. Seeger[1], a major clarification of the boundaries of the exemption was necessary. Seeger, a religious agnostic who had been reared as a Roman Catholic and subsequently become a Quaker, refused to assert that his objection was based upon, or that he personally held, a "belief in a relation to a Supreme Being." The 1948 law appeared to disqualify him, but if it did, would it then not have unconstitutionally discriminated against believers in nontheistic religious doctrines? In a stroke of judicial statesmanship, the Supreme Court avoided this constitutional confrontation, and gave meaning to the "Supreme Being" language which Congress had added, by ruling that:

> "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."

The breadth of this language may even open the way for extending exemption to the conscientious objector who so differs with traditional creeds that he declines to call his belief "religious". In place of the old distinctions—membership in an historic church, belief in a relation to a Supreme Being, and religious as distinct from merely philosophical training and belief, the Seeger case offers a standard freed from many invidious discriminations. While not discriminating in favor of the traditional Jewish and Christian beliefs, it uses those traditional qualifications as a measure for applying the nondiscriminatory standard.

II.

The expanding draft calls for our enlarged commitment in the war in Vietnam poses a new problem for defining the conscientious objector exemption. Though the problem of discriminating between the "just" war and an "unjust" one is an old one historically, it, until now, has not been a live issue in the administration of this exemption. Those who refused to fight in the war against Hitler's totalitarianism tended to be objectors to "war in any form"—complying with the statutory definition. The United Nations' authorization of United States military action in Korea similarly gave that war a sanction that led to few selective objectors. But in the war in Vietnam we face, for the first time in the administration of the 1940 Act and its successors, a not negligible number of draft-eligible youth whose most deeply held beliefs (whether or not they are called "religious") lead them to distinguish between killing for a purpose they view as morally indefensible and killing in some other circumstances. The present statutory provision for conscientious objectors, stemming as it

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[1] 380 U.S. 163 (1965).

does from the exemption of members of the historic peace churches, makes no provision for recognition of this conscience. If we contemplate erasing this established boundary between pacifists and nonpacifists, we begin to fear a journey into an uncharted sea where there may be no boundaries at all. Does the selective objector, after all, ask anything less than the right to serve or not as he in his opinion views the merits of the present employment of our armed services?

The case against recognition of the selective objector essentially makes three assertions:

1) There is a higher moral quality to a pacifism which opposes "war in any form" than there is to a willingness to risk taking another's life for some causes but not for others.

2) In the administration of an exemption from conscription, it is more feasible to distinguish the good faith of an absolute pacifist—even without the older indicia of membership in an historic peace church, belief in a Supreme Being, or even religious training and belief—than it is to test the bona fides of a discriminating objector.

3) The number of genuine pacifists has always been relatively small; by contrast the number of selective objectors may be so great that their exemption will cripple the functioning of the Selective Service System. Attention paid to today's peace protests and antiwar demonstrations underscores the fear that large numbers of draft age youth would stay away from the present war if exempted as selective objectors.

But, on analysis, do these objections really hold up? Consider, first, the moral quality of objection. Of course, there is a distinction between the moral force of a mere disagreement from policies of our nation and a conscientious refusal to participate in killing for them. But does it follow that all those who do not conscientiously refuse to participate in all wars are less conscientious?

The question is really addressed to the complexity of moral issues. Some, like race discrimination, may normally be posed in simple terms of good and evil. But even the thoroughgoing pacifist who examines his society fully may find a need to make careful distinctions. Is he any less a pacifist because he is willing to support and participate in a domestic police force that is armed with lethal weapons? Does he fail because he is willing to drive an automobile, despite the high statistical probability that some deaths will result from each 100,000 miles driven? Might views favoring world government and an international police force disqualify him as a pacifist? In fact a pacifist may contemplate taking the life of another in circumstances, such as these questions suggest, without losing his status as one qualified for exemption; he may still establish that he is an objector to "war in any form".

Indeed, most of our moral judgments suggest that the inherent value of discriminating objection is at least equal to that of an absolute one. All moral judgments must discriminate and it can hardly be claimed that those discriminating on the bases of careful analysis and full data are in any way less valid than are less finely reasoned judgments. It may be that all killing, in any war, is morally indefensible, but the judgments of human society have not concurred in this proposition. The same society can scarcely downgrade those judgments which have concurred with its own as to some wars but discriminatingly object as to others. By every other standard by which we measure moral values, the discriminating, or selective, moral judgment merits respect.

Nor will the argument that the good faith of an absolute pacifist is more feasibly determined, in the administration of the draft law, yield to analysis. The absolute pacifist may have the advantage of long-standing expressions of objection to war and commitment to pacifism. But his entitlement to exemption is in no sense dependent upon proof of long-standing objection. Normally asked, for the first time officially, to declare himself as a conscientious objector or not when he attains age 18, it is hardly to be expected that the objector who is not a member of an historic peace church will have committed himself to pacifism long before then. The requirements of the draft law may represent his first confrontation with the moral issues of peace and war and the law is clear that he is fully entitled to exemption even though his declaration of objection does not occur until he registers—or even until he faces induction.

What is more, the registrant seeking in bad faith to avoid the draft would be the last person to identify himself as an objector to this particular war, rather than as a pacifist. Every practical advantage lies with the claim of absolute pacifism (or objection to "war in any form") and unless one is conscientiously committed to stating only that objection which he actually holds, there would be no incentive in administration of the law—even if it were amended to exempt selective objectors—to claim exemption as an objector to a particular war.

Finally, there is as yet no evidence to support the fear of great numbers of claims to exemption if selective objectors are recognized. All of the same pressures to conformity will operate at least as thoroughly upon the registrant contemplating selective objection as they do today upon the pacifist objector. Even the seemingly large numbers of youth participating in war protest activities will number but a small proportion of those eligible for conscription and the proportion among them who will enter upon the long and arduous road toward establishing exemption cannot be expected to be large. If, on the other hand, a large number of American youth should ever take on this burden, our nation would be insensitive indeed if it did not for that reason undertake a major reappraisal of the policies from which its youth so dramatically dissented.

Offsetting any loss in the numbers that may be available for conscription if selective objectors are exempted, is the patent inefficiency and diseconomy of having in the armed services—or in jail—men who will refuse to violate their consciences by participating in this war, or who are drafted only at the cost of destruction of their own moral integrity. By the most pragmatic of tests, exemption of those individuals makes more sense than either induction or imprisonment.

III.

The present law extends exemption only to those who object to participating in "war in any form". The liberalizing effect of the Seeger decision eliminates its discrimination in favor of adherents to theistic religions. Moreover, as I have suggested, the Seeger rule may provide the basis for eliminating discriminations in favor of beliefs claimed to be religious. Many deeply held beliefs which, in the language of Seeger, occupy "in the life of [their possessors] a place parallel to that filled by the God of those admittedly qualifying for the exemption," do not today denominate themselves religious.

But the discrimination in favor of the pacifist and against the discriminating objector needs now to be confronted. If the grant of an exemption to conscientious objectors is merely an act of grace on the part of the Congress, it is nevertheless true under our constitutional system that the grace may not be extended to some and denied to others without a reasonable basis for differentiation between them. It seems to me doubtful that an exemption made out of respect for deeply held beliefs respecting the taking of human life may reasonably favor some believers and discriminate against others whose beliefs are equally deeply held.

But how are we to measure what belief is sufficiently deeply held? The answer, whether provided by congressional amendment to the present law or through judicial application, must distinguish between convictions meriting the adjective "conscientious" and those which reflect no more than disagreement with the will of government. The Seeger rule offers one formulation: whether the belief "occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption . . .". In another formulation the requisite belief is described as involving "a higher loyalty than loyalty to this country, loyalty to God."[2] Operationally and nontheologically the significant element of this test is the relationship of the belief to its holder's acknowledged duty to the government. All of us at times disagree with the policies and decisions of our government, but such disagreement does not imply a duty to resist. Only in circumstances involving issues of extraordinary moral import do we acknowledge a higher duty requiring us to resist what government has commanded; only rarely do we acknowledge that the command of government fails to relieve us from whatever individual obligation we may perceive to do otherwise. The test, then, is not whether the registrant disagrees with the policies of his government, for mere disagreement fails to distinguish him from the run of ordinary citizens who are subject to the command of law. Rather it is whether he finds it wrong on this issue to yield his will to the command of government--whether the government's command will here fail to relieve him of responsibility for committing the wrong he finds he would commit if he were to obey. Whether he finds it wrong to yield his will to that of government because of a belief in a relationship to a supreme being, because of a belief in a higher law, because of his religion or because of something he calls moral principle or conscience—whatever the reason—it is

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[2] Congress Looks at the Conscientious Objectors, pp. 29-31 (1943).

the fact that the issue is one of which he must assume moral responsibility, unrelieved by that taken by his government, that should be crucial in determining his exemption.

The reason for casting the test in terms such as these, rather than in the traditional terms of "belief in a relation to a supreme being" or "religious training and belief", is that the latter terms both lack the specific meaning necessary to apply a statutory exemption uniformly and are infused with meanings tending to apply it discriminatorily. But as the Seeger case suggests, the characteristics of the traditional objector can be found to have an equivalent in the life of the religious agnostic or other non-traditionalist objector. The suggested formulation is designed to identify those characteristics.

It may be long before Congress can be expected to write a recognition for selective objectors into the present Universal Military Training Act. Perhaps the courts are better equipped to discern and correct the invidious discrimination inherent in extending an exemption to absolute pacifists while denying it to those having equally deeply held beliefs that discriminate among different wars or different forms of warfare. We should applaud those who will carry these issues into litigation for their effort may bring our laws to the point where they will be a credit to a nation committed to individual liberty and to the development of human dignity.

* * *

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Supreme Court of the United States

October Term, 1966

No. .....

DAVID J. MILLER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1966

No. .....

DAVID J. MILLER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on October 13, 1966.

Citations to Opinions Below

There are two opinions by the United States District Court for the Southern District of New York, both by Hon. Harold R. Tyler, Jr., United States District Judge. The first opinion, denying petitioner's motion to dismiss, is

printed in the Appendix hereto, PA24,* and is reported at 249 F. Supp. 259. The second opinion of the District Court, finding the petitioner guilty after trial, is unreported and is printed at PA36. The opinion of the United States Court of Appeals is printed at PA3 and is reported at 358 F. 2d 696 (2d Cir. 1966).

Jurisdiction

The judgment of the United States Court of Appeals was entered on October 13, 1966. PA1. On November 9, 1966, Mr. Justice Harlan issued an order extending the time in which to file this petition for a writ of certiorari up to and including December 12, 1966. The jurisdiction of this court is invoked under 28 U. S. C. §1254 (1).

Questions Presented for Review

1. Whether the August 30, 1965 amendment to Section 12(b)(3) of the Universal Military Service and Training Act, 50 U. S. C. App. §462(b)(3), which made it a felony to knowingly destroy or knowingly mutilate a Selective Service certificate, is an unconstitutional abridgment of freedom of expression guaranteed by the First Amendment, on its face, because the legislative history unequivocally reveals that the amendment to the statute was deliberately enacted for the purpose of suppressing dissent.

2. Whether, and if so to what extent, courts should examine the expressed legislative purpose to determine the

* "PA...." refers to the Appendix hereto.

constitutionality of a statute which affects freedom of expression.

3. Whether the statute, as applied to the facts in this case, is an unconstitutional abridgment of freedom of expression because the conduct which it sought to punish was a peaceful act of symbolic speech protected under the clear and present danger test, which the Court of Appeals refused to apply, but likewise protected under the balancing test, which the Court of Appeals incorrectly applied.

4. Whether the Court of Appeals erred in concluding that this Court no longer applies the clear and present danger test, either wholly, or in part, and has directed that the only standard to be applied in determining the constitutionality of statutes and prosecutions which affect First Amendment rights is the balancing test.

5. Whether the statute serves any legitimate purpose in the administration of the Selective Service System, or any other rational legislative purpose, and whether, in the absence of any legitimate or rational legislative purpose, the statute is an unconstitutional deprivation of individual liberty without due process of law, in violation of the Fifth Amendment.

Constitutional and Statutory Provisions Involved

This case involves the First and Fifth Amendments to the United States Constitution.

The statute involved is P. L. 89-152, 79 Stat. 586, enacted on August 30, 1965, which adds certain language to Section

12(b)(3) of the Act, 50 U. S. C. App. §462(b)(3), as follows:

"(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title (sections 451-454, 455-471 of this Appendix); or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title (said sections), or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title (said sections) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such

certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury." (Language inserted by amendment emphasized.)

Statement of the Case

Petitioner was indicted in the United States District Court for the Southern District of New York on October 19, 1965. He was charged with knowing destruction and mutilation of a Selective Service Notice of Classification in violation of 50 U. S. C. App. §462(b)(3), as amended.

The proposed amendment, which became law on August 30, 1965, was introduced in the House by Rep. Rivers on August 5, 1965.* It was favorably reported by the House Committee on Armed Services on August 9, 1965. H. Rep. No. 747, 89th Cong., 1st Sess. The House Report stated that the Committee was:

> "* * * aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards." (PA41.)

The next day, Cong. Rivers, the bill's sponsor, explained the purpose of the bill on the floor:

> "It is a straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards." (Cong. Rec.—House, August 10, 1965, at 19135; PA45.)

* The entire legislative history is documented in the Appendix hereto. PA40-PA60.

The bill was enacted in the House on August 10, 1965 by a vote of 393 to 1. PA50-PA54. On the same day Sen. Thurmond introduced an identical bill in the Senate, stating:

> "It is not fitting for our country to permit such conduct while our people are giving their lives in combat with the enemy." (Cong. Rec., August 10, 1965, at 19012; PA55.)

The report of the Senate Committee on Armed Services, submitted on August 12, 1965 by Sen. Thurmond stated that the bill resulted from the Committee taking notice "of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy." Sen. Rep. No. 589, 89th Cong., 1st Sess. PA 56. The bill passed the Senate that same day. PA60. It received Presidential approval on August 30, 1965. P. L. 89-152, 79 Stat. 586.

Petitioner's violation of the amended statute occurred on October 15, 1965 at a public meeting held in New York City for the purpose of protesting United States foreign and military policy and the military draft. Since the meeting was held on one of the streets adjoining the United States Army Induction Center at 39 Whitehall Street, New York City, it was referred to by its sponsors as the "Whitehall Speakout". (Appellant's Appendix in Court of Appeals, pp. 37a-39a.)* The meeting was held with New York City Police authorization, a permit for sound amplification equipment having been duly applied for and received. 39a. A United States flag was in evidence as well as a banner

* "....a" refers to Appellant's Appendix in the Court of Appeals, a certified copy of which is being filed in lieu of a transcript of the record, pursuant to Rule 21(3).

which read "End the War in Vietnam." 46a. A large number of policemen were present, and efforts were made, via Police barricades, to separate persons described as "hecklers" from the main body of the audience. 63a.

The meeting was well-publicized. 37a, 40a-45a. An informational leaflet distributed by the sponsors before and after the meeting read in part:

> "* * * there will be *no civil disobedience.* Our job * * * is to communicate our views about the draft and the war in Vietnam to Selective Service employees, young men facing the draft and the many spectators in the street—and to do this as effectively as we can." (116a)

A number of speakers addressed the meeting, including petitioner, who was an advertised speaker, identified as being from the Catholic Worker. 116a. When petitioner was called to the microphone he said "he was not going to give a prepared speech." 69a. He also said he "was a Catholic pacifist and as such was opposed to all wars" and that he was "particularly opposed to war in Vietnam, and the conscripting of young men for that war." He stated that he "would let the action of burning [his] draft card speak for itself". He set fire to his Notice of Classification while standing on the platform in front of the audience. 69a.

Petitioner's symbolic act was characterized by other witnesses as being the "most eloquent statement of the meeting", as receiving "tremendous applause" and likewise "tremendous booing" from the hecklers. 63a. Petitioner stated at the trial that he burned his card "as a

symbolic protest in opposition to conscription, to the Selective Service System, to the war in Vietnam and to the draft card burning law itself." 76a.

Petitioner did not urge others to burn their cards. 28a, 51a, 70a. There was no testimony that anyone else burned draft cards at the meeting. 29a, 52a, 70a. Petitioner did not urge anyone to march anywhere or to do anything. 52a, 70a.

Petitioner testified that the decision to burn his draft card was entirely his own, and although he had been thinking about it earlier, he did not make the final decision until the night before he spoke. 67a, 70a. At the time of his appearance at the meeting, and prior thereto, he was a staff member of the Catholic Worker Movement which consists of a small number of lay Catholics who live in voluntary poverty and serve the poor in the Bowery section of New York City. The Catholic Worker Movement is also involved, according to petitioner's testimony, in working for peace, civil rights and social justice. He shared the views of the Movement in his opposition to war in any form, to the war in Vietnam and to compulsory military service. 64a, 65a.

Petitioner was arrested two days after the meeting, on October 17, 1965, in Hooksett, New Hampshire, while proceeding to St. Anselm's College as a member of a Catholic Worker peace team that had been invited to discuss pacifism with the student body. 71a. He was indicted on October 19, 1965. He pleaded not guilty on October 27, 1965. A motion to dismiss the indictment was timely made

and denied by written opinion of Judge Tyler on December 16, 1965. PA24. Petitioner was tried before Judge Tyler, without a jury, on February 9 and 10, 1966, and found guilty. PA36. He was sentenced by Judge Tyler on March 15, 1966 to a term of imprisonment of three years, execution suspended, and placed on probation for two years subject to the court's standing probation order plus certain special conditions of observance of Selective Service Regulations and obedience to orders of his Selective Service Local Board. PA21.

The judgment and opinion of the Court of Appeals, rendered October 13, 1966, affirmed the conviction.*

Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals has decided important questions of Federal Constitutional law which should be settled by this Court, particularly since some of its holdings are in conflict with applicable decisions of this Court.

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* This is the first case of a conviction under the draft-card burning statute to be presented to this court. There have been several other convictions: *U. S.* v. *Smith,* 249 F. Supp. 515 (S. D. Iowa 1966) (sentence of probation), aff'd per curiam, —— F.2d —— (8th Cir., Nov. 7, 1966); *U. S.* v. *Edelman, et al.* (unreported) (S. D. N. Y. 1966) (three defendants sentenced to six months), appeal pending, 2d Cir.; *U. S.* v. *O'Brien* (unreported) (D. Mass. 1966) (defendant sentenced to 1 to 4 years under Youth Correction Act), appeal pending, 1st Cir.; *U. S.* v. *Reed* (unreported) (D. Mass. 1966) (defendant sentenced to three years, to run concurrently with three year sentence for refusal to report for induction). There have also been guilty pleas: *U. S.* v. *Wilson* (unreported) (S. D. N. Y. 1966) (sentence of probation); *U. S.* v. *Sullivan* (unreported) (S. D. N. Y. 1966) (defendant sentenced to 1 year). At least one other prosecution is pending: *U. S.* v. *Kiger,* S. D. N. Y.

I

Incensed by reports of draft card burnings by young men who were thereby symbolically expressing their opposition to the Vietnam War and the draft, Congress hurriedly amended the Universal Military Training and Service Act to make it a felony to knowingly destroy or knowingly mutilate a Selective Service certificate. There were no legislative hearings. There were no requests for the legislation by the Selective Service System, or by any other agency concerned with national defense or military manpower. Nor were their views or comments solicited. The only legislative purpose, unequivocally expressed by statements of the sponsors and by committee reports in both houses, was to punish this form of symbolic dissent.

The Court of Appeals erroneously refused to acknowledge this clearly revealed unconstitutional purpose. It thereby validated a statute which, by its legislative history, is self-evidently a law abridging freedom of speech.

The entire legislative history is set forth in the Appendix hereto. PA40-PA60. The Court of Appeals acknowledged that "portions" of it,

> "particularly remarks by two Representatives (including the sponsor of the bill in the House)—indicate a desire to suppress political dissent"

PA9, but also pointed out that

> "the more authoritative committee reports also show a concern that destruction of draft cards 'represents a

potential threat to the exercise of the power to raise and support armies.' "[1]

The Court of Appeals' inference that only "portions" of the legislative history indicate a desire to suppress political dissent is not justified by a fair reading of all of the legislative history. The two representatives, Mr. Rivers (the House sponsor), and Mr. Bray, were the *only* ones who spoke about the bill on the House floor. In the Senate only Sen. Thurmond (the Senate sponsor) spoke. This is how he expressed the "need" for the legislation:

> "Recent incidents of mass destruction of draft cards constitute open defiance of the warmaking powers of the government and have demonstrated an urgent need for this legislation." (Cong. Rec.—Senate, Aug. 13, 1965, at 19669) (PA59).

The Court of Appeals apparently concluded that the presence of the "power to raise and support armies" phrase in the Senate Report made the legislative history "inconclusive."

It is hard to imagine how much more conclusive the legislative history could be. Petitioner submits that the attempt by the Court of Appeals to paint a picture of un-

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1. The Court of Appeals refers at this point, via footnote 8, PA9, to both the Senate and House Reports. However, the quoted language comes only from the Senate Report, in the following context:

> "The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies." (PA57).

No such language appears in the House Report.

certainty is not borne out by the record. With all respect, by characterizing the legislative history as "inconclusive" the court seeks to paper over a real problem which it would have had to reach, had it acknowledged that the legislative history left no conclusion other than "a desire to suppress political dissent." That problem is whether or not it could strike down the statute as unconstitutional on its face, if it were convinced that the legislative purpose was unconstitutional.

II

The Court of Appeals expressed uncertainty as to whether the constitutionality of this statute—or any statute—on its face could be successfully attacked by reference to legislative history. Thus, the opinion states in one place that

> "going behind the terms of a statute to divine the collective legislative motive for its enactment is rarely, if ever, done by a court." (PA8).

It states later:

> "We need not go so far as to say that an apparently innocuous statute can never be successfully attacked on the ground that the 'real' congressional motive behind it was impermissible. We say only that the occasions cited to us where this has allegedly been done successfully are few, [and] that they are in several ways distinguishable * * *" (PA11).[2]

2. The court distinguishes *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), and *Lamont* v. *Postmaster-General*, 381 U. S. 301 (1965), aff'g sub nom. *Heilberg* v. *Fixa*, 236 F. Supp. 405 (N. D. Calif., S. Div. 1964) on the grounds that the statutes successfully attacked therein were directly concerned with "regulation

By the use of the word "motive" the court confused the essential difference between that which motivates an individual legislator to cast his vote, and the formal expression of collective legislative purpose via Committee reports, sponsors' explanatory statements, and similar authoritative sources. This distinction was elucidated by Circuit Judge Soper in *National Association for the Advancement of Colored People* v. *Patty,* 159 F. Supp. 503, 515, n. 6 (E. D. Va. 1958); rev'd other grounds, sub nom. *Harrison* v. *N. A. A. C. P.,* 360 U. S. 167 (1959):

> "While it is well settled that a court may not inquire into the legislative motive (Tenney v. Brandhove, 341 U. S. 367, 377, 71 S.Ct. 783, 95 L.Ed. 1019), it is equally well settled that a court may inquire into the legislative purpose. (See Baskin v. Brown, 4 Cir., 174 F. 2d 391, 392-393, and Davis v. Schnell, D. C., 81 F. Supp. 872, 878-880, affirmed 336 U. S. 933, 69 S. Ct. 749, 93 L.Ed. 1093, in which state efforts to disenfranchise Negroes were struck down as violative of the Fifteenth Amendment.) Legislative motive—good or bad—is irrelevant to the process of judicial review; but legislative purpose is of primary importance in determining the propriety of legislative action, since the purpose itself must be within the legislative competence, and the methods used must be reasonably likely to accom-

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of ideas or the means of communicating them", PA9, while here the statute "on its face" concerns administration of the draft. But the Court of Appeals did not distinguish *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960) and *NAACP* v. *Alabama,* 357 U. S. 449 (1958), which were also cited to the court as successful constitutional attacks on statutes via legislative history, in neither of which the statute "on its face" concerned regulation or communication of ideas. Moreover, the validity of this distinction may be seriously questioned. If the legislative history of a statute unequivocally reveals a purpose of suppressing political dissent, the avoidance of blatantly repressive language should not immunize it from constitutional attack. *Cf. Lane* v. *Wilson,* 307 U. S. 268 (1939).

plish that purpose. Because of this necessity, a study of legislative purpose is of the highest relevance when a claim of unconstitutionality is put forward. Usually a court looks into the legislative history to clear up some statutory ambiguity, as in Davis v. Schnell, D. C., 81 F. Supp. at page 878; but such ambiguity is not the *sine qua* for a judicial inquiry into legislative history. See the decision in Lane v. Wilson, 307 U. S. 268, 59 S. Ct. 872, 83 L.Ed. 1281, in which the Supreme Court showed that the state statute before the court was merely an attempt to avoid a previous decision in which the 'grandfather' clause of an earlier statute had been held void."[3]

Circuit Judge Brown, dissenting in *Gomillion* v. *Lightfoot,* 270 F. 2d 594, 608 (5th Cir. 1959), reversed 364 U. S. 339 (1960), admonished his fellow Circuit Judges that

> "We need not be that 'blind' court that Mr. Chief Justice Taft described as unable to see what 'all others can see and understand * * *' Bailey v. Drexel Furniture Co. [Child Labor Tax Case], 1922, 259 U. S. 20, 37 * * *"

The majority Judges in the 5th Circuit in *Gomillion* held themselves barred from examining what they referred to as the legislative motive. To this, Judge Brown responded:

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3. *Cf.* Mr. Justice Douglas' concurring opinion in *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 445-446 (1963):

> "The Virginia Act * * * reflects a legislative purpose to penalize the NAACP because it promotes the desegregation of the races.
>
> "* * * Judge Soper, writing for the Court in NAACP v. Patty * * * did not indulge in guesswork. He reviewed the various steps taken by Virginia to resist our *Brown* decision * * * [T]hey made clear the purpose of the present law—as clear a purpose to evade our prior decision as was the legislation in *Lane* v. *Wilson* * * *"

"What the Legislature of Alabama, as distinguished from its members, *intended* and what the *purpose* of the Legislature, as distinguished from its members, was in the enactment of this law is then a traditional matter for concern to the Judiciary. Obviously the Legislature of Alabama could have had the purpose of discriminating against Negro voters. Many states have had such purpose as the cases discussed in Part V, *supra,* attest. All that Doyle can mean is that in the judicial process of ascertaining *legislative* purpose and intention the individual motives and expression of the individual members is not pertinent. But where the collective purpose and intention of the body is expressly stated or is ascertained on a trial by the exercise of traditional rules of statutory construction in the light of record facts, the judicial ascertainment and declaration of that purpose and intention is not prohibited by the fact that individual legislators, either in legislative chambers or through the press, may have uttered statements of startling candor." (Footnote omitted.) *Id.* at 610.

Statements of precisely such startling candor were uttered by Representative Rivers and Senator Thurmond in enacting the statute here under attack. This Court should recognize them for what they were, and at the same time clarify the permissibility of lower courts doing likewise in appropriate cases.

III

Petitioner contends that the ceremonial burning of a draft card at a public meeting, for the purpose of dramatizing an anti-war, anti-draft speech, is symbolic speech within the protection of the First Amendment. This Court has held that protected symbolic speech includes such conduct as the display of a red flag, *Stromberg* v. *California,* 283

U. S. 359 (1931); peaceful picketing, *Thornhill* v. *Alabama,* 310 U. S. 88 (1940), *Carlson* v. *California,* 310 U. S. 106 (1940), *Milk Wagon Drivers Union* v. *Meadowmoor,* 312 U. S. 287 (1941), cf. *Cox* v. *Louisiana,* 379 U. S. 536, 555 (1965); and the refusal to obey a statute compelling school children to salute the flag, *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943). The "prevailing opinion" of this Court in *Brown* v. *Louisiana,* 383 U. S. 131 (1966), and the concurring opinion of Mr. Justice Harlan in *Garner* v. *Louisiana,* 368 U. S. 157, 201-02 (1961), have expressed the view that peaceful civil rights demonstrations, a "sit-in" in *Garner,*[4] and a "stand-up" in *Brown,*[5] are likewise protected as symbolic speech. First Amendment rights "are not confined to verbal expression. They embrace appropriate types of action * * *." *Brown* v. *Louisiana,* at 142.[6]

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4. "Such a demonstration, in the circumstance of these two cases, is as much a part of the 'free trade in ideas', *Abrams* v. *U. S.,* 260 U. S. 616, 630 (Holmes, J. dissenting), as is verbal expression, more commonly thought of as 'speech.' It, like speech, appeals to good sense and to 'the power of reason as applied through public discussion', *Whitney* v. *California,* 274 U. S. 357, 375 (Brandeis, J. concurring), just as much as, if not more than, a public oration delivered from a soap box at a street corner." *Ibid. Cf.* Kalven, *The Negro and the First Amendment* 131 (1965).

5. Mr. Justice Brennan in his Concurring Opinion in *Brown,* 383 U. S. at 146, appears to adopt the views of Mr. Justice Harlan in *Garner.* See also Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment," 79 Harv. L. Rev. 1, 4 (1965).

6. Summarizing the symbolic speech decisions of this Court, Chief Judge Sobeloff has written:

> "The First Amendment affords protection not merely to the voicing of abstract opinions upon public issues. It also protects implementing conduct which is in the nature of advocacy."

National Labor Relations Board v. *International Longshoremen's Association,* 332 F. 2d 992, 999 (4th Cir. 1964).

The Court of Appeals devoted considerable attention to discussing the symbolic speech doctrine. PA11-PA14. It posed a number of interesting hypothetical questions about different forms of conduct which might be characterized as symbolic speech. But it did not rule on whether or not the draft-card burning ritual was or was not symbolic speech.[7] Instead, it proceeded to discuss the proper constitutional test, ruled that the balancing test was to be applied, and held that even if the conduct in question was symbolic speech, it was not that kind of symbolic speech which was protected by the First Amendment. PA15.

Petitioner urges that the court below erred in not finding that the ceremonial burning of a draft card was well within the long line of decisions of this Court which have protected symbolic speech.

Moreover, petitioner submits that a decision by this Court as to the proper metes and bounds of protected symbolic speech is a constitutional issue of public importance, separate and apart from the issue of the proper constitutional test to be applied. With the proliferation of public demonstrations expressing dissent to governmental authorities on many questions, and the constant emergence of new and unprecedented forms of demonstration,[8] there is an obvious public interest in this Court's providing guide-

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7. "We are not at all sure that destroying a draft card, even at a public rally, must be regarded as an exercise of speech, but we are willing to assume it *arguendo* * * *." PA14.

8. Compare *Garner* v. *Louisiana,* 368 U. S. 157 (1961); *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Cox* v. *Louisiana,* 379 U. S. 536 (1965); *Brown* v. *Louisiana,* 383 U. S. 131 (1966); *Adderley* v. *Florida,* —— U. S. ——, 35 U. S. L. Week 4013 (Nov. 14, 1966).

lines for the benefit of Congress, police authorities, and potential demonstrators.[9]

IV

Petitioner's counsel are not aware of any other case where a Court of Appeals has so explicitly ruled that it may not apply the clear and present danger test because of its reading of the decisions of this Court.[10] PA16. Obviously, if the Court of Appeals was in error in this respect, its judgment must be reversed.[11]

Moreover, there can hardly be a constitutional question of greater public importance in the entire area of First Amendment rights, then the need for clarification by this Court as to whether or not lower courts, in reviewing Governmental action in the area of the First Amendment, must apply the balancing test, or the clear and present danger test, or are free to apply either.[12]

Petitioner urges that under either standard the verbal conduct of which he stands convicted is protected by the

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9. *Cf. Turner* v. *New York,* —— U. S. ——, 35 U. S. L. Week 3147 (Oct. 25, 1966), where this Court granted certiorari to review convictions of disorderly conduct arising from an anti-Vietnam war demonstration in Duffy Square, in midtown Manhattan.

10. The court held that such decisions "seem to require" the use of the balancing test. It relied principally on *American Communications Assn.* v. *Douds,* 339 U. S. 382 (1950), holding that its exposition of the balancing test is still valid notwithstanding *United States* v. *Brown,* 381 U. S. 437 (1965).

11. This Court has applied the clear and present danger test most recently in *Wood* v. *Georgia,* 370 U. S. 375 (1962). See also *Thomas* v. *Collins,* 323 U. S. 516 (1945); *Taylor* v. *Mississippi,* 319 U. S. 583 (1943); *Bridges* v. *California,* 314 U. S. 252 (1941); *Herndon* v. *Lowry,* 301 U. S. 242 (1937).

12. For a critique of the balancing test see Frantz, *The First Amendment in the Balance,* 71 Yale L. J. 1424 (1962). For an analysis of both tests, which expresses a preference for the clear and present danger test, see Emerson, *Toward a General Theory of the First Amendment,* 72 Yale L. J. 877, 910-912, 912-914 (1963).

First Amendment and the conviction must be reversed. If this Court holds that the clear and present danger test is not to be applied, and the balancing test is to be applied, it is of equal public importance that the balancing test should be properly applied so that restrictions on freedom of speech shall be kept within proper constitutional limits.[13]

V

Petitioner urges that the statute, both on its face and as applied, is an unconstitutional deprivation of liberty without due process of law, since the statute serves no rational legislative purpose. The Court of Appeals misinterpreted petitioner's argument based on substantive due process as being no more than an attack on the wisdom of the statute. PA20.

It is true that the due process clause may no longer be used to strike down industrial or regulatory laws "because they may be unwise * * *" *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 (1955). But where a statute involves an infringement of individual liberty, as distinguished from economic or business regulation,[14] the due process clause

13. The Court of Appeals' weighing of the government-interest side of the balance, PA17, consists of the itemization of a number of possible advantages which retention of the Selective Service Notice of Classification might have for the *registrant*. But in terms of benefit to the *government*, so as to legitimatize the requirement, it refers only to "fire or other disaster" necessitating reconstruction of files, and to "extreme emergency (*e.g.*, a call-up by radio)". The trial court, although it referred in both opinions to the administrative advantages to the Selective Service System, at no point specified even a single one. See PA30, PA31, PA39. The Court of Appeals' attempt to fill this interstice is not persuasive.

14. *Cf. Marsh* v. *Alabama*, 326 U. S. 501, 509 (1946); *Thomas* v. *Collins*, 323 U. S. 516, 529-530 (1945); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115 (1943); *A. F. of L.* v. *Swing*, 312 U. S. 321, 325 (1941); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938).

requires a justification of the statute's legitimate legislative purpose. See *Griswold* v. *Connecticut,* 381 U. S. 479, 482 (1965); *Aptheker* v. *Secretary of State,* 378 U. S. 500, 505 (1964); *Bolling* v. *Sharpe,* 347 U. S. 497 (1954); *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925); *Meyer* v. *Nebraska,* 262 U. S. 390, 399-400 (1923).[15]

In its defense of individual liberty, substantive due process establishes limitations "upon all powers of Congress, even the war power." *Galvan* v. *Press,* 347 U. S. 522, 530 (1954). This Court should grant certiorari to dispel the uncertainty which apparently continues to persist, concerning the scope of this important constitutional limitation.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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15. *Cf.* Mr. Justice Goldberg, concurring in *Griswold* v. *Connecticut, supra* at 492:

> "As any student of this Court's opinions knows, this Court has held, often unanimously, that the 5th and 14th Amendments protect certain fundamental personal liberties from abridgment by the Federal Government or the States". (citing cases)

APPENDIX

Judgment of Affirmance of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of October one thousand nine hundred and sixty-six.

Present:

Hon. J. EDWARD LUMBARD, Chief Judge,
Hon. LEONARD P. MOORE,
Hon. WILFRED FEINBERG, Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID J. MILLER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Judgment of Affirmance of the United States Court of Appeals

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

Judgment Entered 11-2-66
John J. Olear, Jr.
Clerk

A true copy,
A. Daniel Fusaro
Clerk

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

DAVID J. MILLER,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*
MOORE and FEINBERG, *Circuit Judges.*

FEINBERG, *Circuit Judge*:

This case raises perplexing issues of whether symbolic conduct is speech embraced by the First Amendment and the extent of its protection thereunder. The appeal challenges the constitutionality of a federal statute prohibiting the destruction of Selective Service certificates; the ultimate question before the court is the power of Congress to enact the legislation. The constitutional issues are raised by David J. Miller, who appeals from a judgment convicting him of knowingly destroying a Selective Service System Notice of Classification. Appellant was tried without a jury before Judge Tyler in the Southern District of New York. Taking into account Miller's sincerity and background, the judge suspended execution of a sentence of three years' imprisonment and placed appellant on two years' probation.[1] We hold the statute constitutional and affirm the conviction.

I. The Statute and the Facts

Appellant was convicted of violating section 12(b)(3) of the Universal Military Service and Training Act ("the

1. Special conditions of probation were that appellant obtain and carry a classification notice and obey orders of his draft board, probation to terminate if he entered military service.

Act"), as amended by 79 Stat. 586 (1965), 50 U. S. C. App. §462(b)(3) (Supp. I, 1965). In August 1965, that section was amended to prohibit the knowing destruction or mutilation of a Selective Service certificate; the amended statute was the basis of appellant's conviction.[2] Judge Tyler found it undisputed that on October 15, 1965, at a street rally near the Army Building at 39 Whitehall Street in Manhattan, appellant burned his "draft card."[3] Appellant performed this act in the course of giving a speech; he believed

2. Section 12(b) of the Act provides:

Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification of representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title, or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury. [Emphasis added.]

3. The certificate was actually a Notice of Classification (SSS Form No. 110). See Judge Tyler's opinion disposing of pre-trial motions, 249 F. Supp. 59 (S. D. N. Y. 1965), and our discussion *infra,* pp. 3416-19.

the burning to be a symbolic protest against the draft, the military action in Vietnam, and "the draft card burning law itself." The court further found that other methods of speech used at the rally, although less dramatic than appellant's action, served as reasonably effective communication of the ideas involved.[4] Before considering appellant's arguments it is instructive to examine the history of the statute under discussion.

Even prior to the August 1965 amendment, section 12(b) of the Act stringently regulated the physical certificates issued by the Selective Service System. It was thus illegal —with improper intent—to transfer a certificate to aid a person in making a false identification or representation, or to possess a certificate not duly issued to oneself for those purposes, or to forge, alter "or in any manner" change a certificate or any notation validly inscribed thereon, or to photograph or make an imitation of a certificate for false identification purposes, or to possess a counterfeited or altered certificate. In addition, under the authority delegated him by Congress (section 10(b)(1) of the Act), the President had promulgated a regulation requiring those who have been classified by a local board to have in their personal possession at all times the Notice of Classification (SSS Form No. 110), except when entering upon active duty into the Armed Forces, when the certificate must be surrendered for destruction. 32 C. F. R. §1623.5 (1962). Violation of this regulation was made a felony by section 12(b)(6) of the Act.[5]

4. *United States* v. *Miller,* 65 Cr. 937, S. D. N. Y., March 7, 1966. For articles dealing with the case and the statute, see Forkosch, *Draft Card Burning—Effectuation and Constitutionality of the 1965 Amendment,* 32 Brooklyn L. Rev. 303 (1966); Rachlin, *Draft Cards and Burning the Constitution, id.* at 334; 34 Fordham L. Rev. 717 (1966); 11 N. Y. L. F. 584 (1965).

5. The Registration Certificate (SSS Form No. 2, discussed *infra*) was also required to be in the registrant's personal possession at all times. 32 C. F. R. §1617.1 (1962).

The Notice of Classification itself is a white card, about the thickness of a postcard, and about two inches by three inches in size. The front of the Notice burned by appellant was in the following form:

SELECTIVE SERVICE SYSTEM

NOTICE OF CLASSIFICATION

_____

(First name) (Middle initial) (Last name)

Selective Service No.

is classified in Class ———

until _____

☐ by Local Board,

☐ by Appeal Board
vote of ——— to ———

☐ by President

_____

(Date of mailing)

_____

(Member or clerk of local board)

_____

(Registrant's signature)

SSS Form No. 110 (Revised 5-7-63)
(Approval not required)

The back provided:

(Local Board Stamp)

You are required to have this notice, in addition to your Registration Certificate, on your person at all times and to surrender it upon entering active duty in the Armed Forces.

The law requires you to notify your local board in writing (1) of every change in your address, physical condition, and occupational, marital, family, dependency, and military status, and (2) of any other fact which might change your classification within 10 days after it ocurs.

Your Selective Service Number, shown on the reverse side, should appear on all communications with your local board. Sign this form immediately upon reecipt.

FOR INFORMATION AND ADVICE, GO TO ANY LOCAL BOARD

The Registration Certificate referred to (SSS Form No. 2) is given to all Selective Service registrants when they register; important information contained on the Notice of Classification does not appear on the Registration Certificate, *i.e.,* the registrant's classification, who classified him, and the vote, if by an Appeal Board. These facts do not develop until after a registrant has received Form No. 2. See 32 C. F. R. §§1617.1, 1622.1(c), 1623.1(a) (1962); Forkosch, *supra* note 4, at 303-04. See also 32 C. F. R. §1627.3 (Supp. 1966) (significance of vote).

To summarize, the Act and a regulation, even before the 1965 amendment was passed, required the Notice containing a registrant's classification to be in his possession at all times, and imposed stringent penalties for tampering with the certificate and in other ways subjecting it to abuse.

II. Constitutional Arguments

Since appellant does not claim here that he did not violate the statute—nor is there any room for doubt on this score—and since no procedural infirmities are raised, we turn to the constitutional arguments advanced. Appellant contends that the 1965 amendment is unconstitutional (1) on its face, because its legislative history establishes that it was enacted deliberately to suppress dissent; (2) as applied to the facts of this case, because the conduct it punishes this defendant for is symbolic speech protected by the First Amendment; and (3) under the Fifth Amendment, because it serves no rational legislative purpose.[6]

As to the first contention, going behind the terms of a statute to divine the collective legislative motive for its enactment is rarely, if ever, done by a court. Thus, in *Sonzinsky* v. *United States,* 300 U. S. 506, 513-14 (1937), the Supreme Court stated that "inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts." See *Barenblatt* v. *United States,* 360 U. S. 109, 132 (1959); *United States* v. *Kahriger,* 345 U. S. 22, 27 (1953) (allegation that improper motive was revealed in legislative history); *Tenney* v. *Brandhove,* 341 U. S. 367, 377 (1951); *Daniel* v. *Family Security Life Ins. Co.,* 336

6. Constitutional questions were duly preserved for review by appropriate motions below; other arguments in the trial court, *e.g.,* that a Notice of Classification is not a "certificate' under 50 U. S. C. App. §462(b)(3), have apparently been abandoned.

U. S. 220, 224 (1949). Ordinarily, if Congress has power to act in a field, judicial inquiry ends so long as the statute does not on its face infringe a constitutional right.[7] The 1965 amendment appears to meet this test. Congress clearly has power under Article I, section 8 of the Constitution to "raise and support Armies," and the Universal Military Training and Service Act and the 1965 amendment thereto are, in their terms, proper exercises of that power. See *Lichter* v. *United States,* 334 U. S. 742, 756-58 n. 4 (1948); *Selective Draft Law Cases,* 245 U. S. 366 (1918). On its face, the amended statute here attacked concerns administration of the draft, not regulation of ideas or the means of communicating them. This distinguishes such cases as *Lamont* v. *Postmaster General,* 381 U. S. 301 (1965), and *Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936), relied on by appellant.

To prove the "real" congressional purpose of the 1965 amendment, appellant resorts to its legislative history, a source frequently used to construe the terms of a statute. But that history is inconclusive. Even though portions—particularly remarks by two Representatives (including the sponsor of the bill in the House)—indicate a desire to suppress political dissent, the more authoritative committee reports also show a concern that destruction of draft cards "represents a potential threat to the exercise of the power to raise and support armies."[8] It may even be conceded that the amendment was prompted by widely publicized burnings of draft cards occurring in demonstrations against

7. We agree that when a First Amendment right is involved, the impact of the statute as applied must also be examined (see pp. 3422-31 *infra*); but this is a wholly different argument leading to a different inquiry.

8. *Compare* 111 Cong. Rec. 19135 (daily ed. Aug. 10, 1965) *with* S. Rep. No. 589, 89th Cong., 1st Sess. 2 (1965), *and* H. R. Rep. No. 747, 89th Cong., 1st Sess. 2 (1965).

this country's Vietnam policy.[9] But neither does that control disposition of the case. *People* v. *Stover,* 12 N. Y. 2d 462, appeal dismissed, 375 U. S. 42 (1963), involved a bizarre display of offensive objects on a clothesline in a residential area to protest high property taxes. Thereafter, the City of Rye enacted an ordinance which, in effect, prohibited clotheslines in a front or side yard abutting a street. On appeal from a conviction for violation of the ordinance, the New York Court of Appeals said (per Fuld, *J.,* 12 N. Y. 2d at 466):

> It is a fair inference that adoption of the ordinance before us was prompted by the conduct and action of the defendants but we deem it clear that, if the law would otherwise be held constitutional, it will not be stricken as discriminatory or invalid because of its motivation. (Cf. *Town of Hempstead* v. *Goldblatt,* 9 N Y 2d 101, affd. 369 U. S. 590.)

The 1965 amendment clearly was intended to stop draft card burnings, but on its face the statute is narrowly drawn and does not discriminate between card-burning as protest or as something unrelated to symbolic communication. Another factor illustrates the difficulty here of adverting to motive, rather than looking primarily to the terms of the statute itself, in testing its constitutionality on its face. The duty to keep Selective Service certificates on one's person has been in existence for many years and has been held constitutional. *United States* v. *Kime,* 188 F. 2d 677 (7th Cir.), cert. denied, 342 U. S. 823 (1951) (registrant claimed that religious belief motivated him not to carry certificate). Appellant does not claim that this requirement was aimed

9. See Finman & Macaulay, *Freedom to Dissent: The Vietnam Protests and the Words of Public Officials,* 1966 Wis. L. Rev. 632, 644-53.

at suppressing dissent; had appellant destroyed the certificate in 1962 and been indicted for willful non-possession under the then applicable law, improper congressional motive would surely not have been successfully argued. But what Congress did in 1965 only strengthened what was already a valid obligation of existing law; *i.e.*, prohibiting destruction of a certificate implements the duty of possessing it at all times. Therefore, to isolate and examine the motive of Congress in 1965 seems even less justifiable than it would ordinarily be.

We need not go so far as to say that an apparently innocuous statute can never be successfully attacked on the ground that the "real" congressional motive behind it was impermissible. We say only that the occasions cited to us where this has allegedly been done successfully are few, that they are in several ways distinguishable,[10] and that none involved a mere implementation of an already existing regulatory scheme. Under these circumstances, we decline to hold the 1965 amendment unconstitutional on its face.

Of course, this does not end the case. Appellant urges the First Amendment defense even more vigorously in his alternate argument that, as applied to the facts of this case, the statute is an unconstitutional suppression of speech. Appellant reasons as follows: Symbolic speech is protected by the First Amendment; burning a draft card in a public meeting is such symbolic speech; moreover, card-burning is a most dramatic form of communication, and there is a constitutional right to make one's speech as effec-

10. *E.g.*, in *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), the Supreme Court relied on the unfair administration of a local ordinance in reversing a conviction of Chinese laundry operators. No such contention is made here; *e.g.*, appellant does not claim that he was reclassified because he participated in a protest demonstration. See also reference to *Lamont* v. *Postmaster General* and *Grosjean* v. *American Press Co.*, *supra*, p. 3420.

tive as possible, subject to the proper constitutional standard; and, finally, whether that standard be the clear and present danger test or a balancing of interests, the statute as it was applied to him is unconstitutional.

These syllogisms require examination of basic concepts. It may be assumed that by burning his draft card, David Miller intended to communicate his ideas in an especially effective way and succeeded in doing so. Appellant relies on Supreme Court decisions protecting an individual's right to express, or refrain from expressing, an idea symbolically. Thus, *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U. S. 624 (1943), held that a compulsory flag salute was an unconstitutional violation of First Amendment rights of Jehovah's Witnesses. In that case, Mr. Justice Jackson said (319 U. S. at 632-33):

> There is no doubt that . . . the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. . . . A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

Twelve years before, in *Stromberg* v. *California,* 283 U. S. 359 (1931), the Court struck down on First Amendment grounds a state statute that prohibited "the display of a red flag as a symbol of opposition by peaceful and legal means to organized government." See *Barnette, supra* at 633. See also *Carlson* v. *California,* 310 U. S. 106 (1940). Similarly, other unconventional symbolic acts have been recognized as means of communication, *e.g.,* picketing—*Thornhill* v. *Alabama,* 310 U. S. 88 (1940); civil rights sit-

ins—see *Garner* v. *Louisiana,* 368 U. S. 157, 201-02 (1961); *Brown* v. *Louisiana,* 383 U. S. 131, 141-42 (1966).[11]

But that conduct may be symbolic does not end the matter; it is only the beginning of constitutional inquiry. Is all communicative action symbolic speech and is all symbolic speech protected by the First Amendment? The range of symbolic conduct intended to express disapproval is broad; it can extend from a thumbs-down gesture to political assassination. Would anyone seriously contend that the First Amendment protects the latter?[12] Appellant would undoubtedly respond that peaceful symbolic acts, as contrasted to violent ones, are protected and that draft card burning is clearly the former. The distinction is significant, of course; it was recognized in *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.,* 312 U. S. 287 (1941), which denied free speech protection to picketing intertwined with acts of violence. But what of other more peaceable but unconventional symbolic acts? In *People* v. *Stover, supra,* the display of offensive objects on a clothesline was a protest against high property taxes; the court held that a zoning ordinance prohibiting such conduct was constitutional.[13] What of protests made dramatic by turning on water faucets,[14] dumping of garbage in front of City

11. This characterization of a sit-in was accepted by Mr. Justice Harlan in *Garner* and by the "prevailing opinion" of Mr. Justice Fortas in *Brown* (joined in by Chief Justice Warren and Mr. Justice Douglas).

12. "Political assassination is a gesture of protest, too, but no one is disposed to work up any First Amendment enthusiasm for it." Kalven, *The Negro and the First Amendment* 133 (1965).

13. It is perhaps significant that an appeal to the Supreme Court was dismissed for want of a substantial federal question, 375 U. S. 42 (1963) The case is discussed in Comment, 64 Col. L. Rev. 81 (1964).

14. Kalven, *The Concept of the Public Forum*: *Cox* v. *Louisiana,* in 1965 The Supreme Court Review 1, 11.

Hall,[15] stalling cars at an event attracting heavy traffic,[16] burning an American flag on a street corner,[17] or tearing up on television a court order or a document required to be kept under internal revenue regulations? Each such act may be designed to mobilize public opinion against an existing statute or government policy; yet, sincere motivation or the labeling of even non-violent conduct as symbolic does not necessarily transform that conduct into speech protected by the First Amendment. It may be that particular considerations surrounding a specific symbolic act justify clothing it in the concept of speech. Thus, picketing, like sit-ins, may be the poor man's printing press;[18] similarly, the technique of a "silent and reproachful presence"[19] may be the only means of true communication in certain areas of the civil rights struggle. We mention all these acts not to decide whether they are properly characterized as speech but only to emphasize the complexity of the problem. We are not at all sure that destroying a draft card even at a public rally must be regarded as an exercise of speech, but we are willing to assume it *arguendo,* as the district court did. However, this only forms the basis for further analysis. Appellant concedes that even speech may be regulated, or in certain circumstances prohibited, provided that the proper constitutional test is met; it is here that appellant contends the 1965 amendment fails.

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15. N. Y. Times, April 22, 1964, p. 1, col. 6.

16. *Id.,* August 22, 1963, p. 18, col. 2.

17. *People* v. *Street* (N. Y. C. Crim. Ct., Kings Co., July 26, 1966, appeal pending, App. T., 2d Dep't) in N. Y. Times, July 27, 1966, p. 47, col. 6.

18. Kalven, *op. cit. supra* note 12, at 133.

19. *Brown* v. *Louisiana,* 383 U. S. 131, 142 (1966) (opinion of Fortas, *J.*).

Appellant argues that since speech is involved, the statute prohibiting it must be evaluated under the clear and present danger test, which, in its classic statement, is:

> whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Schenck v. *United States,* 249 U. S. 47, 52 (1919). See also *Bridges* v. *California,* 314 U. S. 252 (1941). However, recent Supreme Court decisions have applied a balancing approach to determine the constitutionality of legislation that indirectly restricted speech. In *American Communications Assn.* v. *Douds,* 339 U. S. 382 (1950), certain unions challenged a statute that required union officials to file a non-Communist affidavit as a condition of using the services of the National Labor Relations Board. Rejecting the argument that the statute violated the First Amendment, the Court said (339 U. S. at 399):

> When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented.

More recent cases indicate the continued vitality of this balancing test. See *Konigsberg* v. *State Bar,* 366 U. S. 36, 49-51 (1961); *Communist Party* v. *Subversive Activities Control Bd.,* 367 U. S. 1, 91 (1961). See also *Barenblatt* v. *United States,* 360 U. S. 109, 126-27 (1959); *NAACP* v. *Alabama,* 357 U. S. 449, 461 (1958); *United States* v.

Aarons, 310 F. 2d 341, 345 (2d Cir. 1962). The district court apparently employed this standard. We agree that the most recent Supreme Court decisions seem to require its use, at least where a narrowly-drawn statute on its face regulates conduct, not the communication of ideas.[20]

Under this approach, the public interest to be protected is the proper functioning of the Selective Service System. In a world where resort to force is still the rule, rather than the exception, this is an interest of the highest order; its importance undoubtedly accounts for the many decisions rejecting First Amendment defenses to Selective Service violations. See *United States* v. *Kime, supra; United States* v. *Mohammed,* 288 F. 2d 236, 244 (7th Cir.), cert. denied, 368 U. S. 820 (1961); *United States* v. *Miller,* 233 F. 2d 171 (2d Cir. 1956) (*per curiam*); *Gara* v. *United States,* 178 F. 2d 38 (6th Cir. 1949), aff'd by an equally divided court, 340 U. S. 857 (1950). Indeed, we do not understand appellant to question the need for proper operation of the draft; instead he questions whether the 1965 amendment actually serves this important end. The trial court held that it did, but appellant argues that the court gave no reasons to support its conclusion and that there are none in fact.

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20. While *United States* v. *Brown,* 381 U. S. 437 (1965), reaches on a bill of attainder theory a result inconsistent with *American Communications Assn.* v. *Douds,* 339 U. S. 382 (1950), we do not regard it as a rejection of use of the balancing test in the situation before us. For a criticism of the test if used generally, see Emerson, *Toward a General Theory of the First Amendment,* 72 Yale L. J. 877, 912-14 (1963); see also Frantz, *The First Amendment in the Balance,* 71 Yale L. J. 1424 (1962); Meiklejohn, *The First Amendment Is an Absolute,* in 1961 The Supreme Court Review 245; Black, *The Bill of Rights,* 35 N. Y. U. L. Rev. 865 (1960). For more sympathetic treatment of a balancing test, see Karst, *Legislative Facts in Constitutional Litigation,* in 1960 The Supreme Court Review 75; Mendelson, *Justices Black and Frankfurter: Conflict in the Court* (1961).

We conclude that forbidding destruction of Selective Service certificates serves legitimate purposes in administering the system. To begin with, the Notice of Classification serves as proof of registration and it also contains complete information as to a registrant's classification, including the type and date thereof, and the period for which it is effective. Thus, inability to produce the card provides an easy means of initially detecting those attempting to evade their Selective Service obligations.[21] Similarly, in time of war or national emergency, it provides an instant means in a transient society of determining a registrant's fitness for immediate induction, if exigencies require it. Thus, appellant lives in New York City but is registered in Syracuse. In an extreme emergency (*e.g.*, a call-up by radio), he could be ordered to report to a local board in New York City, although that board has no record relating to appellant; only if he possessed his own Notice of Classification could his fitness for induction be determined accurately and expeditiously. Moreover, the Notice of Classification can assist a local board to reconstruct files destroyed by fire or other disaster.[22] In addition, the Notice carries a continual reminder to a registrant of his obligation to notify his local board of facts which might change his classification. The Notice also guarantees a registrant's prompt receipt of accurate information of his current status and enables him to prove it should the occasion arise. Moreover, it facilitates his personal inquiries to a local board: To provide correct information as to a registrant's present draft status, the board must know his current classification. If a registrant inquires of his own local board, the Notice furnishes this knowledge quickly

21. Forkosch, *supra* note 4, at 324-25.

22. *Ibid.*

without a search of records; if the registrant inquires of another local board in a community where he happens to be, it may be the only way he can obtain the information. To conclude, proper functioning of the system depends upon the aggregated consequences of individual acts; in raising an army no less than in regulating commerce, cf. *Wickard* v. *Filburn,* 317 U. S. 111, 127-28 (1942), the seriousness of an individual's acts must often be assessed not only in isolation but under the assumption that they may be multiplied manifold. Therefore, the interest to be served—efficient functioning of the Selective Service System—is furthered by the statute under attack.

Against these reasons must be weighed the effect of the statute on freedom of expression. Except to prohibit destruction of certificates, the statute does not prevent political dissent or criticism in any way. It is narrowly drawn to regulate a limited form of action. Under the statute, aside from destroying certificates, appellant and others can protest against the draft, the military action in Vietnam and the statute itself in any terms they wish—and indeed did so at the rally where appellant was arrested. Appellant claims, however, that the burning of a draft card is more dramatic than mere speech and that he has a right to the most effective means of communication. But surely this generalization has its own limits. In *Kovacs* v. *Cooper,* 336 U. S. 77 (1949), a conviction was affirmed under an ordinance forbidding the use on public streets of sound trucks or any other instrument which emitted a "loud and raucous" noise. To the claim that the statute unconstitutionally abridged freedom of speech, the "prevailing opinion" of the Court stated (336 U. S. at 88-89):

> That more people may be more easily and cheaply reached by sound trucks . . . is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance *when*

> *easy means of publicity are open.* Section 4 of the ordinance bars sound trucks from broadcasting in a loud and raucous manner on the streets. *There is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers.* [Emphasis added.]

We do not imply that the existence of many means of communication may ordinarily justify a ban on one of them; for example, suppression of a newspaper because radio and television are available is clearly unconstitutional. See *NLRB* v. *Fruit Packers,* 377 U. S. 58, 79-80 (1964) (Black, *J.,* concurring). We only say that in the case of the symbolic speech posed here, such a consideration is proper. See *Kovacs* v. *Cooper, supra* at 97 (Jackson, *J.,* concurring) ("The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself, and all we are dealing with now is the sound truck."). Moreover, pure speech and conduct offered symbolically as speech need not be regarded as identical. In *Cox* v. *Louisiana,* 379 U. S. 536, 555 (1965), the Court said:

> We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech. . . . We reaffirm the statement of the Court in *Giboney* v. *Empire Storage & Ice Co., supra,* at 502, that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."

See also *City of Greenwood* v. *Peacock,* 384 U. S. 808, 826-27 (1966). Viewing all of the considerations, we find that under the test applied in *American Communications Assn.* v. *Douds, supra,* and in later cases,[23] "the particular conduct [destruction of draft cards] is regulated in the interest of public order," that "the regulation results in an indirect" and minimal abridgment of "speech" and that the former "demands the greater protection under the particular circumstances presented." *Accord, United States* v. *Smith,* 249 F. Supp. 515 (S. D. Iowa 1966), appeal pending, 8th Cir. We are supported in this conclusion by the knowledge that appellant and those who agree with him remain free, as indeed they should be, to criticize national policy as vigorously as they desire by the written or spoken word; they are simply not free to destroy Selective Service certificates.

Appellant's final argument is that since the statute does not serve any rational legislative purpose the statute is an unconstitutional deprivation of individual liberty without due process of law under the Fifth Amendment. Thus, appellant points out that the 1965 amendment has been called "a silly law" in a national periodical with extensive circulation.[24] However, it is not the province of the judiciary to praise or condemn this law; our function is to determine only the power of Congress in enacting the statute, not its wisdom. For the reasons already given at length above, we find that the statute is neither arbitrary nor without purpose, that it is reasonably related to the power of Congress to raise and support armies, and that it reinforces an obligation which has been imposed upon registrants for many years. Accordingly, the judgment of conviction is affirmed.

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23. See cases cited *supra,* p. 3426.

24. See Wainwright, "A Serious To-Do About a Silly Law," Life, March 4, 1966, p. 17.

Judgment of the District Court

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

No. 65 Cr. 937

UNITED STATES OF AMERICA

v.

DAVID J. MILLER

On this 15th day of March, 1966, came the attorney for the government and the defendant appeared in person, and by counsel

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and a finding of Guilty by the Court, the defendant having waived trial by jury of the offense of unlawfully, wilfully and knowingly destroying and mutilating a Notice of Classification (SSS Form No. 110) issued pursuant to the Universal Military Training and Service Act, and the rules, regulations and directions made pursuant thereto (Title 50, Appendix, U. S. Code, Section 462 (b); 32 Code of Federal Regulations, Section

1632) as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is sentenced to THREE (3) YEARS. Execution of sentence is suspended and the defendant is placed on probation for a period of TWO (2) YEARS, subject to the standing probation order of this Court and upon the following special conditions:

1—That two weeks after the filing of the judgment in this case, the defendant is required to obtain and to carry on his person at all times a draft card (SSS Form No. 110).

2—That the defendant shall obey all orders and directions of his Selective Service Board.

3—That the period of probation in this case will be terminated if as and when the defendant enters into the Military Service.

The defendant is continued on his present bail until such time as he posts bail pending appeal in the sum of $500., which bail must be posted by 4:00 P.M. March 21, 1966.

It is Further Ordered that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

Judgment of the District Court

It is Further Ordered that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

H. R. Tyler, Jr.
United States District Judge.

John J. Olear, Jr.
Clerk.

Opinion of the District Court Denying Motion to Dismiss

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

against

DAVID J. MILLER,

Defendant.

ROBERT M. MORGENTHAU, Esq., United States Attorney, by Assistant United States Attorney
PETER FLEMING, JR. and FRANK M. TUERKHEIMER, Attorneys for the United States of America.

MARVIN M. KARPATKIN, Esq.,
RHODA H. KARPATKIN, Esq.,
OSMOND K. FRAENKEL, Esq.,
NANETTE DEMBITZ, Esq.,
MELVIN L. WULF, Esq., and
HENRY M. di SUVERO, Esq., of New York, N. Y.
Attorneys for Defendant.

TYLER, D.J.

Defendant Miller, who has been charged with knowingly destroying and mutilating his Notice of Draft Classification (SSS Form No. 110) (hereinafter "Notice") pursuant to the provisions of 50 Appendix United States Code

462(b), as recently amended by 79 Stat. 586, Public Law 89—152, August 30, 1965, moves to:

1. Dismiss the indictment, or, in the alternative, to

2. Receive a bill of particulars with regard to the charge, and to

3. Discover and inspect various documents and effects, including the charred remains of his aforesaid Notice.

For reasons to be briefly hereinafter discussed, the motion to dismiss the indictment prior to trial is denied, and the motions for particulars and discovery, as will be more specifically delineated, are granted in part and otherwise denied.

I.

Upon his motion to dismiss, Miller argues variously that: (1) the indictment fails to charge a crime against the United States; (2) the indictment effectively denies or abridges his rights to freedom of speech, assembly and exercise of political rights, all as guaranteed to him by the First, Ninth and Tenth Amendments to the Constitution of the United States; (3) the indictment effectively denies him due process of law under the Fifth Amendment because the underlying criminal statute serves no legitimate legislative purpose; and (4) the indictment would work a deprivation of his right to be free from cruel and unusual punishment as secured to him by the Fifth and Eighth Amendments.[1] All of these claimed defi-

1. Defendant's precise argument here under the Fifth Amendment is unclear; perhaps he would suggest that severe and unusual punishment would constitute a denial of substantive due process.

ciencies, as Miller is aware, must be found at this stage, if they are to be found at all, on the face of the indictment or its statutory underpinning.

A. Contention that the indictment fails to state a crime against the United States.

In order to put this contention in focus, it is necessary to indicate that defendant's basic argument consists of the following syllogism.

> 1. Only destruction and mutilation of a "certificate" constitutes a violation of the pertinent provision of Section 462(b).
>
> 2. A Notice of Classification is not, as a matter of fact or law, a certificate.
>
> 3. Thus, Miller's alleged destruction and mutilation of his Notice does not constitute a violation of the statute.

Simply stated, defendant's second or minor premise is erroneous. Although it may be argued that neither the provisions of Title 50 Appendix nor the regulations thereunder categorically define the Notice (SSS Form No. 110) to be a "certificate", it is plain enough from the face of Section 462(b) as a whole that Congress certainly there used the word "certificate" with intention to embrace, among other Selective Service documents, the Notice in question. *See United States* v. *Turner,* 246 F. 2d 228, at 230 (2d Cir. 1957).

With an erroneous minor premise, Miller's syllogism necessarily collapses. Beyond this, however, it should be noted that the indictment says much more than "a certificate"; it continues to allege, "to wit, a Notice of Classi-

fication (SSS Form 110), issued pursuant to the Universal Military Training and Service Act. * * *" No plainer language in full accord with the plain meaning of the pertinent provisions of Section 462(b) can be imagined; thus, defendant has ample and definite notice of the offense of which he is being charged, and he does not, as I understand him, argue to the contrary.

B. Contention that the indictment denies defendant his constittuional rights of free speech, assembly and exercise of political rights.

As defendant's counsel virtually conceded during oral argument of this motion, there is presently no firm factual basis for raising or passing upon the contentions under the First, Ninth and Tenth Amendments prior to trial of the indictment. Certainly, the statutory language on its face suggests no issues, let alone deprivations of rights, under the Amendments cited. The pertinent part of Section 462(b) simply makes it a crime to "knowingly destroy(s), knowingly mutilate(s) * * *" a Notice or other certificate. The indictment language is essentially that of the statute. Even defendant, then, must perceive that there is nothing on the face of either the statute or the indictment which remotely suggests any problem of free speech or free assembly or free exercise of political rights as guaranteed by the Constitution. Certainly not one of defendant's cited cases comes close to supporting his contentions in this area.

But Miller's lawyers attempt to avoid this obvious point by suggesting that the statute might affect speech or assembly upon certain hypothetical facts. Surely, counsel must know that federal courts cannot decide constitutional questions before they are squarely presented in the context of solidly determined, as opposed to hypothetical,

facts. See *United States* v. *Raines,* 362 U. S. 17, at 20-21 (1960). Moreover, it does no good at this early stage of the proceedings to suggest further, as defendant does, that mutilation or destruction of a Notice must be considered "symbolic speech" within the ambit of First Amendment safeguards. It can be observed that Miller's citations in support of this proposition are cases involving statutes which, largely by their terms, proscribed "symbolic speech" (e.g. *Stromberg* v. *California,* 283 U. S. 359 (1931)) or unreasonably compelled such speech (e.g. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943)) in dereliction of First Amendment protections —something which Section 462(b)(3) on its face does not appear to do.

More significant, defendant's arguments must await a development of the facts at trial. Tempting as it might be to surmise now that Miller almost certainly could effectively exercise his rights of free expression and protest, if such was his intention on the day in question, without the additional and supposedly symbolic act of destroying his card, I reject the temptation simply because it must be assumed in fairness that defendant might develop facts at trial to fairly raise the issue of whether or not his First Amendment rights have been unreasonably restricted by the application of Section 462(b)(3), no matter how rational and necessary that statute appears by its terms. See e.g., *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); concurring opinion of Harlan, J. in *Garner* v. *Louisiana,* 368 U. S. 157, at 196-207 (1961).

C. Contention that the indictment denies defendant due process of law under the Fifth Amendment.

Essentially, defendant's argument here is that the pertinent amendment to Section 462(b) serves no legitimate or rational legislative purpose. In fairness to defendant,

it might be more accurate to say that under this general contention, he argues, first, that on its face the statutory language proscribing destruction and mutilation of a Notice neither enhances nor in any way significantly effects the "economic or military capabilities of the United States", and, second, on the basis of its legislative history, the new language of Section 462(b)(3) was passed by Congress without any concern for or purpose under its war powers. To illustrate, defendant points out, *inter alia,* that destruction of a Notice in itself cannot normally preclude or significantly delay service in the armed forces by registrant, that the Selective Service System did not request such an amendment to the law and that speeches on the floor of Congress indicated beyond a doubt that, in the minds of the speaking solons at least, the new language was designed for no other purpose than to discourage critics of the government's war policies and objectives in Southeast Asia.

When called upon to decide whether or not legislation comports with necessary standards of substantive due process, the courts must "determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." *Nebbia* v. *New York,* 291 U. S. 502, at 536 (1934). This is not to say, however, that courts should be governed by subjective views of the political wisdom of the legislative enactment in question; rather, the judicial branch can only be properly concerned with whether or not the statute under attack serves purposes reasonably related to legitimate powers of Congress under the Constitution—and that it so serves without discrimination or caprice.

On its face, the amended language of Section 462(b) meets the standards of substantive due process. As is

widely known, for example, the regulations of the Selective Service System for at least the past twenty years have required registrants to carry their Notices of Classification upon their persons. 32 C. F. R. 1617.1 and 1623.5. This circumstance alone suggests that it is by no means irrational for Congress to take the additional step of making it a crime to knowingly destroy one's Notice in order to underscore the long-established duty of a registrant to maintain continuous possession of that document. Nor does it require unusual imagination to conceive of the several desirable and perhaps in some instances crucial administrative advantages to the Selective Service officials and draft boards in a system of personal retention of classification information by each potential draftee. Conversely, it is not unreasonable to infer that advantage may accrue to an individual registrant in such continued retention of the Notice, particularly, for example, upon the not impossible occasion—almost too horrible to contemplate—of an erroneous bureaucratic assumption of a higher classification than that actually assigned by the local board and happily inscribed upon that Notice safely tucked in the registrant's wallet.

Parenthetically, although I do not read defendant's briefs to explicitly make the point, it is conceivable that his serious contention here may amount to this: Assuming that the due process test of a "rational basis" has been met for this particular legislation, this is not necessarily an adequate test with respect to possible abridgement of freedom of speech, assembly and the exercise of political rights. In other words, as has been discussed *infra* at pages 8 to 10, it is theoretically possible that legislation, valid enough upon grounds of purpose and rationality, may unnecessarily impinge upon Bill of Rights protections. See *Board of Education* v. *Barnette, supra,* at 639;

Cantwell v. *Connecticut, supra.* To be sure, in the words of Mr. Justice Black in *Giboney* v. *Empire Storage Co.,* 336 U. S. 490, at 498 (1949), "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute", and for this reason alone it can be well understood why the government here argues, not without persuasiveness, that upon no conceivable set of circumstances can Miller ever effectively establish infringement of his First Amendment privileges. Nevertheless, this potential issue must be fairly left for that day when the events and circumstances of the alleged offense have been fully developed as a result of the trial process.

Returning to the main theme, it would be easy to take notice in detail of other obvious benefits to the authorities and the public of the requirement of continuous retention by each individual of his Notice of Classification. Enough has been said, however, to make the obvious point that on its face the amended language of Section 462(b) is a reasonable exercise of the powers of Congress to raise armies in the defense of the United States. It matters not that destruction of his card will not impede the possible call-up of defendant, nor is it of any consequence that almost certainly thousands of men in recent decades, including the writer, have unwittingly failed to carry their cards at all times without ever having been called to show or produce them. See *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U. S. 483, at 487-88 (1955).

Most important here, what motivated members of Congress in enacting the amended provisions of Section 462(b) is irrelevant. This court must look only to the statutory language itself, particularly, where, as here, that language is simple and plain on its face. Determination of the state of mind of those legislators to whose speeches defendant

specifically points and the other members of Congress voting on this amendment is beyond the competence of this court and in any event would be a largely irrelevant exercise. *Sonzinsky* v. *United States,* 300 U. S. 506, at 513-14 (1937). Even assuming that some Congressional members possessed a state of mind or motives totally unrelated to proper legislative purposes, the point remains, as already indicated above, that the simple language of Section 462 (b)(3), as amended, clearly relates to legitimate Congressional ends under the war powers. See *McCray* v. *United States,* 195 U. S. 27 (1904); *Barenblatt* v. *United States,* 360 U. S. 109, at 132 (1959).

Finally, brief mention may be made of defendant's argument that the amending language is totally at odds with the thrust of the other and older provisions of Section 462, all of which, it is argued, are aimed at striking down fraud in the operation of the Selective Service System. From this, he infers that the new language is rendered "jarring" and unclear, thus requiring the court to look to the legislative history for construction or interpretation. Leaving aside the circumstance that Miller's cited authorities render little or no support for this ingenious assertion, it must be observed that Section 462 is the only "offenses and penalties" or "crimes" section in the Selective Service Act. Thus, Congress must be assumed to have sensibly decided not to add a new "criminal" section merely for the purpose of this brief and simple amendment. More important, it is not necessary or appropriate to look to legislative history when the language, as here, could not be plainer. *Van Camp* v. *American Can Co.,* 278 U. S. 245, at 253 (1929). Then, too, Congress certainly was mindful that knowing destruction of a Notice was closely akin to wilfull non-possession of this document, another offense long sanctioned by the same section

of the statute. 18 U. S. C. 462(b)(6), 32 C. F. R. 1623.5. In short, the 1965 amending language is by no means as "jarring" to or "far out" from the preexisting statutory scheme as claimed; thus, this and defendant's other arguments in the due process area must be found wanting.

D. Contention that the amendment to Section 462 is void as imposing cruel and unusual punishment.

As is the case with respect to all crimes spelled out in Section 462, the new offense of knowing destruction and mutilation of a Notice is a felony punishable by imprisonment up to five years and/or by a fine up to the amount of $10,000. Miller argues that this is cruel and unusual punishment barred by the Eighth Amendment. It might be interesting to explore this contention, but the government is clearly correct in urging that it is prematurely raised. No penalty has been imposed upon Miller, and none may ever be imposed. See *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, at 104 (1961). Thus, Miller's arguments here must await the occasion, if and when it comes, of a definite sentence imposed for this offense.

Miller's various grounds for dismissing the indictment are found to be insufficient or premature, and thus his motion to dismiss prior to trial is denied.

II.

Turning to Miller's demand for a bill of particulars, the prosecution in its papers and during oral argument has consented to furnish those particulars sought in paragraphs 1, 3, 4, 5 and 14 of defendant's notice of motion. Most of the remaining demands seek to elicit the prosecution's evidence, a purpose for which a bill of particulars

normally cannot serve. Some of the demands, moreover, do not seem to relate clearly to any potential issues in the case. Thus, with one exception to be noted hereinafter, the remaining demands serve no proper function of a bill such as clarification of the charge, avoidance of surprise at trial or anticipation of a possible double jeopardy plea in the event of a subsequent criminal complaint or indictment.

The one exception, arguably doubtful as such from the government's point of view, is to be found in paragraph 2 of Miller's demand. Here in substance he requests the date of issuance of his notice, the identity of the issuing draft board and the substantive information contained upon the face of the Notice. In my view, Miller is entitled to this as a matter of simple fairness even though it is alleged that he possessed and then destroyed and thus "abandoned" the original. Such particulars before trial will establish in effect whether or not there were several Notices of Classification furnished to Miller[2] and, if so, which one it is that Miller is charged with destroying.

III.

Miller also seeks to discover and inspect the remains of the Notice which he is said to have burned or destroyed. Additionally, he seeks to inspect and copy any statements or "confessions" which he may have made in writing to the Federal Bureau of Investigation or any government agency.

Curiously, Miller has proffered no affidavit in support of these requests. The prosecutor, however, has made an affidavit stating upon information and belief that Miller burned his Notice and let the remains fall without any

2. See Miller's demand No. 17, which, in effect will thus also be answered in part by a reply to demand No. 2.

attempt to claim or recover them. Thus, as suggested heretofore, the government argues that he has abandoned and forfeited any right to ownership or possession thereof, a prerequisite under Rule 16 for the relief here sought. On the record, the government's argument is not illogical. Beyond this, however, defendant has made no showing that the remains of the Notice may be material to the preparation of his defense or that this particular request is reasonable. Largely for this reason, defendant's demand to inspect the charred remains of his Notice is denied.

As to inspection of any statements of his in writing, Miller makes no attempt to describe such in any detail. Indeed, I cannot be sure from his papers or those of the prosecution that any such written statements were taken by or given to a government agent. Particularly under these circumstances, I see no reason to abandon the usually followed rule in this circuit (see *United States* v. *Murray,* 297 F. 2d 812, at 820 (2d Cir. 1962), *cert. den.* 369 U. S. 828 (1962)) that discovery of such statements is not permissible prior to trial.

Accordingly, defendant's discovery motion is denied in its entirety, without prejudice, however, to his right to make application to the trial judge for inspection of some or all of these same materials during the trial.

An order should be settled on notice to reflect the foregoing.

Dated: New York, N. Y., December 16, 1965.

H. R. Tyler, Jr.
U. S. D. J.

Opinion of the District Court After Trial

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Cr. 937

UNITED STATES OF AMERICA,

against

DAVID J. MILLER.

TYLER, D.J.

This case was tried before the court sitting without a jury on February 9 and 10, 1966. At the conclusion of the trial, the court found David J. Miller guilty as charged in the indictment. In response to an inquiry from the court, defense counsel specifically waived specific findings as provided in Rule 23(c), Federal Rules of Criminal Procedure.

Indeed, the essential facts of what transpired on the day in question, October 15, 1965, at the street rally down near the Army Building at No. 39 Whitehall Street, in the City of New York, are not in dispute. The principal issue in the case was perhaps most aptly summarized by the defendant himself when, in response to a question put by him to his own counsel, he stated as follows:

> "I burned my draft card as a symbolic protest in opposition to conscription, to the Selective Service System, to the war in Viet Nam, and to the draft card burning law itself."

Immediately thereafter, Miller was asked this question and gave the following answer:

"Q. And this was done in the course of a speech which you were delivering on those subjects?

A. That's correct."

In short, the prime defense raised by the defendant to this charge, prior to, during and after trial, has been the contention that his admitted burning of his draft card was an act of symbolic speech protected in full by the First Amendment to the Constitution. In finding defendant guilty as charged, this court necessarily passed upon and overruled this defense. The reasons for this court's ruling on this issue may be said to have been adequately set forth in the opinion filed on December 16, 1965 passing upon defendant's various pre-trial motions. In the earlier opinion, for example, it was stated that the authorities cited by defendant are inapposite to the indictment on trial and to the statute on which it is based, Public Law 89-152 of August 30, 1965 (50 U. S. C. Appendix 462(b)). E.g. *West Virginia State Board of Education* v. *Barnett,* 319 U. S. 624 (1943); *Stromberg* v. *California,* 283 U. S. 359 (1931). The evidence adduced at trial does nothing to shake this conclusion. Nonetheless, it might be helpful to sharpen the discussion further and, in particular, to answer the specific arguments of defendant's able counsel as advanced by them after the proofs were completed.

As I understand defense counsel, for example, they respond to the observation that David Miller could have sufficiently expressed his opinion in opposition to conscription, the Selective Service System in general, the war in Viet Nam and the very draft card destruction statute in question without burning his card on the day in question, with the argument that the First Amendment would permit Miller to make the most dramatic and compelling speech possible, such as the symbolic event which he perpetrated, with full immunity from prosecution under this

or any other statute. A simple answer to this ingenious argument, it seems to me, is that neither the authorities cited by defense counsel nor any case that I have been able to find support the proposition that the First Amendment entitles one to full protection of the most dramatic form of speech available, especially where other adequate but less dramatic means are at hand to be used by the speaker in question. Another way of putting this would be to say that even if it is assumed *arguendo* that what Miller did on October 15th last was an act of symbolic communication, any regulation thereof results only in a partial abridgment of his freedom of speech because other or more normal forms of communication were still open to him that day. To bespeak the obvious, he could have spoken against all of the things he desired without burning his notice of classification. See *Stromberg* v. *California, supra,* at page 368; *American Communications Association* v. *Douds,* 339 U. S. 382, at page 400 (1950). First Amendment freedoms are not absolute, and their exercise often must give way to clear public or governmental interests. *American Communications Association* v. *Douds, supra,* at pages 398-99; *Brown* v. *Louisiana,* —— U. S. ——, decided February 23, 1966, at page 15 of slip opinion (dissenting opinion by Mr. Justice Black).

As a practical matter, the very evidence of what transpired at the street rally in question on October 15th demonstrates that other methods of speech—though less dramatic and shocking than Miller's action—served as reasonably effective communication of the ideas in question. Although it is true that most of the witnesses at trial agreed that David Miller got the largest proportion of cheers (and boos as well), it also seems to be beyond question that the other speakers obtained applause for their efforts—i.e. they were able to make their points to the

crowd assembled—without burning their classification cards, if such they had, or doing any other act sanctioned by a presumptively valid criminal statute. See *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490, at page 498 (1949).

Miller's counsel also argue that even if the statute be assumed to serve a valid governmental purpose, it is such a limited and largely duplicative weapon in the arsenal of selective service sanctions that the court should strike a balance in favor of any First Amendment rights which happen to be impinged upon by its application. But, as indicated in this court's December 16 opinion, the governmental purpose of this statute is clear enough, and this court cannot and will not substitute its judgment for that of Congress in providing for and preserving an effective means of drafting young citizens for military service. This being so, to strike the balance in favor of Miller would be virtually to license him and others so inclined to ignore their responsibilities to the national defense requirements of this nation.

The defendant will appear for sentencing on March 15, 1966 at 2:15 p.m.

March 7, 1966.

H. R. Tyler, Jr.
U. S. D. J.

[1]

House Report No. 747

House of Representatives

89th Congress—*1st Session*

PROHIBITION OF DESTRUCTION OR MUTILATION OF DRAFT CARDS

AUGUST 9, 1965.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. RIVERS of South Carolina, from the Committee on Armed Services, submitted the following

REPORT

[To accompany H.R. 10306]

The Committee on Armed Services, to whom was referred the bill (H.R. 10306) to amend the Universal Military Training and Service Act of 1951, as amended, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of the proposed legislation is to provide a clear statutory prohibition against a person knowingly destroying or knowingly mutilating a draft registration card.

EXPLANATION OF THE BILL

Section 12(b)(3) of the Universal Military Training and Service Act of 1951, as amended, provides that a person

who forges, alters, or in any manner changes his draft registration card, or any notation duly and validly inscribed thereon, will be subject to a fine of $10,000 or imprisonment of not more than 5 years. H.R. 10306 would amend this provision to make it apply also to those persons who knowingly destroy or knowingly mutilate a draft registration card.

The House Committee on Armed Services is fully aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards.

While the present provisions of the Criminal Code with respect to the destruction of Government property may appear broad enough [2] to cover all acts having to do with the mistreatment of draft cards in the possession of individuals, the committee feels that in the present critical situation of the country, the acts of destroying or mutilating these cards are offenses which pose such a grave threat to the security of the Nation that no question whatsoever should be left as to the intention of the Congress that such wanton and irresponsible acts should be punished.

To this end, H.R. 10306 makes specific that knowingly mutilating or knowingly destroying a draft card constitutes a violation of the Universal Military Training and Service Act and is punishable thereunder; and that a person who does so destroy or mutilate a draft card will be subject to a fine of not more than $10,000 or imprisonment of not more than 5 years.

House Report No. 747

COMMITTEE POSITION

The Committee on Armed Services, a quorum being present, by a vote of 19 to 1 agreed to favorably report H.R. 10306 to the House of Representatives.

FISCAL DATA

Enactment of this legislation will not involve the expenditure of any Federal funds.

CHANGES IN EXISTING LAW

In compliance with paragraph 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill are shown as follows (changes in existing law are printed in italic):

SECTION 462(b)(3) OF TITLE 50, UNITED STATES CODE

462. Offenses and penalties

(a) * * *

(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates* or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints,

or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title, or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to [3] exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury.

Congressional Record—House

[19134]

August 10, 1965

PROHIBITION OF DESTRUCTION OR MUTILATION OF DRAFT CARDS

Mr. RIVERS of South Carolina. Mr. Speaker, I ask unanimous consent that the Committee of the Whole House on the State of the Union be discharged from further consideration of the bill (H.R. 10306) to amend the Universal Military Training and Service Act of 1951, as amended, and for its immediate consideration.

The Clerk read the title of the bill.

The SPEAKER. Is there objection to the request of the gentleman from South Carolina?

There was no objection.

The Clerk read the bill, as follows:

H.R. 10306

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the [19135] Universal Military Training and Service Act, as amended, is hereby further amended as follows:

SECTION 1. Section 12(b)(3) is amended to read as follows:

"(3) who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or".

Mr. GROSS. Mr. Speaker, I move to strike the last word.

I believe we should have an explanation of the bill.

Mr. RIVERS of South Carolina. Mr. Speaker, will the gentleman yield?

Mr. GROSS. I yield to the gentleman from South Carolina.

Mr. RIVERS of South Carolina. Mr. Speaker, the bill, H.R. 10306, amends the Universal Military Training and Service Act to establish a clear statutory provision against a person knowingly destroying or knowingly mutilating a draft card. Existing law provides a penalty for anyone forging or altering a draft card, but there is no specific prohibition against destroying or mutilating a draft card.

The purpose of the bill is clear. It merely amends the draft law by adding the words "knowingly destroys and knowingly mutilates" draft cards. A person who is convicted would be subject to a fine up to $10,000 or imprisonment up to 5 years. It is a straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards.

We do not want to make it illegal to mutilate or destroy a card per se, because sometimes this can happen by accident. But if it can be proved that a person knowingly destroyed or mutilated his draft card, then under the committee proposal, he can be sent to prison, where he belongs. This is the least we can do for our men in South Vietnam fighting to preserve freedom, while a vocal minority in this country thumb their noses at their own Government.

Mr. GROSS. Mr. Speaker, the gentleman from South Carolina in his usual lucid manner has convinced me that this is a very good bill, and I am ready and willing and able to withdraw my reservation.

Mr. BRAY. Mr. Speaker, I move to strike out the last word.

(Mr. BRAY asked and was given permission to revise and extend his remarks.)

Mr. BRAY. Mr. Speaker, the bill that we have before us today is simple and easy to understand. H.R. 10306 is an

amendment to our selective service law providing that it is illegal to knowingly mutilate or destroy a draft card. It is already illegal to alter, forge or change such a card.

The need of this legislation is clear. Beatniks and so-called "campus-cults" have been publicly burning their draft cards to demonstrate their contempt for the United States and our resistance to Communist takeovers. Such actions have been suggested and led by college professors —professors supported by taxpayers' money.

At Rutgers University, Prof. Eugene Geonese [Genovese], who prides himself on being a Marxist, publicly said that he "welcomed a Communist Vietcong victory." The board of governors refused to dismiss him.

Just yesterday such a mob attacking the United States and praising the Vietcong attempted to march on the Capitol but were prevented by the police from forcibly moving into our Chambers. They were led by a Yale University professor. They were generally a filthy, sleazy beatnik gang; but the question which they pose to America is quite serious.

These so-called "student" mobs at home and abroad make demands and threats; they hurl rocks and ink bottles at American buildings; they publicly mutilate or burn their draft cards; they even desecrate the American flag. Chanting and screaming vile epithets, these mobs of so-called "students" and Communist "stooges" attempt to create fear and destroy self-confidence in our country and its citizens and to downgrade the United States in the eyes of the world.

Such organized "student" groups in the United States have sent congratulations and money to Ho Chi Minh and have made anonymous and insulting calls to families of our servicemen killed in Vietnam.

This proposed legislation to make it illegal to knowingly destroy or multilate a draft card is only one step in

bringing some legal control over those who would destroy American freedom. This legislation, if passed, will be of some assistance to our country if the officers and courts charged with the enforcement of the law will have the energy, courage, and guts to make use of it.

The growing disrespect for our law and institutions in America holds a real threat to our country and to our freedom. Just 5 short years ago no one would have believed that disrespect for our country could have grown to the proportions that it has today.

Disrespect for our American heritage and anti-American demonstrations are all a part of the cold war in some way directed by those who would destroy us. The Communist world is aware that it cannot destroy the effectiveness of the United States by the use of its economic and military strength, because we are far stronger in these fields than it is and we outdistance it more every year.

Then how is the Communist victory to be brought about? The Communists are planning to use the "Judas goats" to lead those who are free to defect from freedom. So-called "students" and Communist stooges here and abroad, by demonstrations of anti-American feeling, by belittling, and by vilification are to downgrade the United States in the eyes of the world and shake the confidence and faith of our citizens in our democratic way of life. They hope to attain victory over freedom by subversion within the United States and by erosion of our national pride and confidence in the greatness of America and our national heritage.

One of America's greatest sources of strength in discouraging these demonstrations is to pause and consider the greatness of America—to appreciate what our country has done for the benefit of mankind. Let us have a rebirth of patriotism. Let us be proud, possessed not of an arrogant pride, but a humble pride in our greatness, in our heritage.

Aside from becoming the strongest country economically and militarily during the last quarter century, this country, without any desire to gain a square foot of territory, has been the principal force in overthrowing the armed might of Hitler and Japan. The strength of the United States saved both Europe and Asia from the despotic rule of tyrants. We asked nothing in return. We asked no gain for this victory brought about by American dollars, American production, and American youth. The people of the United States have unselfishly contributed more to the feeding, care, welfare, and rehabilitation of the world than has all of the rest of the world combined. All of this has been done without any thought of gain except the reward of the deed itself.

The United States, without hope of personal gain, blocked the Communist takeover of South Korea and today is assuming the major role of blocking Communist slavery in southeast Asia. Yet there are today those in America who are weak at heart, those of little faith in the greatness of America and freedom, those who are naive and refuse to face up to the realities of Communist aggression. There are those who in various degrees and for various reasons ask our Government to yield more and more to Communist aggression.

Our Government, through fear of the public opinion at home and abroad of our enemies, is failing to adequately enforce our laws on subversion and antigovernmental attacks. That is exactly as our enemies have planned it. In the exercise of our great ideals of fairness and tolerance, we seem to forget that it is axiomatic that a goverment must protect its citizenry against illegal acts and against mob violence. When decent, productive people are forced to support and coddle criminals and other dregs and drones of society, chaos, degradation, and ruin are inevitable.

Tolerance ceases to be a virtue when it condones evil. Governmental tolerance ceases to be a virtue when it allows mob violence on the law-abiding members of its society—when it winks at unlawful disrespect to its institutions and the flag. This is true whether this tolerance is the result of apathy, a maudlin sympathy, or a fear of the opinions of enemies.

When the mob once learns that its actions will lead to granting of its demands and its actions are condoned, there is a multiplication both of its demonstrations, riots, and wanton destruction, and of its demands.

If these "revolutionaries" are permitted to deface and destroy their draft cards, our entire Selective Service System is dealt a serious blow.

Mr. Speaker, I strongly urge all my fellow Members to support this legislation.

[19136] The SPEAKER. The question is on engrossment and third reading of the bill.

The bill was ordered to be engrossed and read a third time and was read the third time.

The SPEAKER. The question is on passage of the bill.

The question was taken.

Mr. HALL. Mr. Speaker, I object to the vote on the ground that a quorum is not present and make the point of order that a quorum is not present.

The SPEAKER. Evidently a quorum is not present.

The Doorkeeper will close the doors, the Sergeant at Arms will notify absent Members, and the Clerk will call the roll.

The question was taken; and there were—yeas 393, nays 1, not voting 40, as follows:

[Roll No. 230]

YEAS—393

Abbitt
Abernethy
Adair
Addabbo
Albert
Anderson, Ill.
Anderson, Tenn.
Andrews, George W.
Andrews, Glenn
Andrews, N. Dak.
Annunzio
Arends
Ashbrook
Ashley
Ashmore
Aspinall
Ayres
Baldwin
Bandstra
Baring
Barrett
Bates
Battin
Beckworth
Belcher
Bell
Bennett
Berry
Betts
Bingham
Blatnik
Boggs
Boland
Bolling
Bolton
Bow
Bray
Brock
Brooks
Broomfield
Brown, Calif.
Broyhill, N. C.
Broyhill, Va.
Buchanan
Burke
Burleson
Burton, Calif.
Burton, Utah
Byrne, Pa.
Byrnes, Wis.
Cabell
Callan
Callaway
Carey
Casey
Cederberg
Celler
Chamberlain
Chelf
Clancy
Clark
Clausen, Don H.
Clawson, Del.
Cleveland
Clevenger
Cohelan
Collier
Conte
Cooley
Corbett
Corman
Craley
Cramer
Culver
Curtin
Curtis
Daddario
Dague
Daniels
Davis, Ga.
Davis, Wis.
Dawson
de la Garza
Delaney
Dent
Denton
Derwinski
Devine
Dickinson
Dingell
Dole
Donohue
Dorn
Dow
Dowdy
Downing
Dulski
Duncan, Oreg.
Duncan, Tenn.
Dwyer

Dyal
Edmondson
Edwards, Ala.
Edwards, Calif.
Ellsworth
Erlenborn
Evans, Colo.
Everett
Fallon
Farbstein
Farnsley
Farnum
Fascell
Feighan
Findley
Fino
Fisher
Flood
Flynt
Fogarty
Foley
Ford, Gerald R.
Ford, William D.
Fountain
Fraser
Frelinghuysen
Friedel
Fulton, Pa.
Fulton, Tenn.
Fuqua
Gallagher
Garmatz
Gathings
Gettys
Giaimo
Gibbons
Gilbert
Gilligan
Gonzalez
Goodell
Grabowski
Gray
Green, Pa.
Greigg
Grider
Griffin
Griffiths
Gross
Grover
Gubser
Gurney
Hagan, Ga.
Hagen, Calif.
Haley
Hall
Halleck
Halpern
Hamilton
Hanley
Hanna
Hansen, Idaho
Hansen, Iowa
Hansen, Wash.
Hardy
Harris
Harsha
Harvey, Ind.
Harvey, Mich.
Hathaway
Hébert
Hechler
Helstoski
Henderson
Herlong
Hicks
Holifield
Holland
Horton
Howard
Hull
Hungate
Huot
Hutchinson
Ichord
Jacobs
Jarman
Jennings
Joelson
Johnson, Calif.
Johnson, Okla.
Johnson, Pa.
Jonas
Jones, Ala.
Jones, Mo.
Karsten
Karth
Kastenmeier
Kee
Keith
Kelly
King, Utah
Kirwan
Kluczynski
Kornegay

[Roll No. 230]

YEAS—393

Abbitt
Abernethy
Adair
Addabbo
Albert
Anderson, Ill.
Anderson, Tenn.
Andrews, George W.
Andrews, Glenn
Andrews, N. Dak.
Annunzio
Arends
Ashbrook
Ashley
Ashmore
Aspinall
Ayres
Baldwin
Bandstra
Baring
Barrett
Bates
Battin
Beckworth
Belcher
Bell
Bennett
Berry
Betts
Bingham
Blatnik
Boggs
Boland
Bolling
Bolton
Bow
Bray
Brock
Brooks
Broomfield
Brown, Calif.
Broyhill, N. C.
Broyhill, Va.
Buchanan
Burke
Burleson
Burton, Calif.
Burton, Utah
Byrne, Pa.
Byrnes, Wis.
Cabell
Callan
Callaway
Carey
Casey
Cederberg
Celler
Chamberlain
Chelf
Clancy
Clark
Clausen, Don H.
Clawson, Del.
Cleveland
Clevenger
Cohelan
Collier
Conte
Cooley
Corbett
Corman
Craley
Cramer
Culver
Curtin
Curtis
Daddario
Dague
Daniels
Davis, Ga.
Davis, Wis.
Dawson
de la Garza
Delaney
Dent
Denton
Derwinski
Devine
Dickinson
Dingell
Dole
Donohue
Dorn
Dow
Dowdy
Downing
Dulski
Duncan, Oreg.
Duncan, Tenn.
Dwyer

Dyal
Edmondson
Edwards, Ala.
Edwards, Calif.
Ellsworth
Erlenborn
Evans, Colo.
Everett
Fallon
Farbstein
Farnsley
Farnum
Fascell
Feighan
Findley
Fino
Fisher
Flood
Flynt
Fogarty
Foley
Ford, Gerald R.
Ford, William D.
Fountain
Fraser
Frelinghuysen
Friedel
Fulton, Pa.
Fulton, Tenn.
Fuqua
Gallagher
Garmatz
Gathings
Gettys
Giaimo
Gibbons
Gilbert
Gilligan
Gonzalez
Goodell
Grabowski
Gray
Green, Pa.
Greigg
Grider
Griffin
Griffiths
Gross
Grover
Gubser
Gurney
Hagan, Ga.
Hagen, Calif.
Haley
Hall
Halleck
Halpern
Hamilton
Hanley
Hanna
Hansen, Idaho
Hansen, Iowa
Hansen, Wash.
Hardy
Harris
Harsha
Harvey, Ind.
Harvey, Mich.
Hathaway
Hébert
Hechler
Helstoski
Henderson
Herlong
Hicks
Holifield
Holland
Horton
Howard
Hull
Hungate
Huot
Hutchinson
Ichord
Jacobs
Jarman
Jennings
Joelson
Johnson, Calif.
Johnson, Okla.
Johnson, Pa.
Jonas
Jones, Ala.
Jones, Mo.
Karsten
Karth
Kastenmeier
Kee
Keith
Kelly
King, Utah
Kirwan
Kluczynski
Kornegay

Krebs
Kunkel
Laird
Landrum
Langen
Latta
Leggett
Lennon
Lipscomb
Long, La.
Long, Md.
Love
McClory
McCulloch
McDade
McDowell
McEwen
McFall
McGrath
McMillan
McVicker
Macdonald
MacGregor
Machen
Mackay
Mackie
Madden
Mahon
Mailliard
Marsh
Martin, Ala.
Martin, Mass.
Martin, Nebr.
Mathias
Matsunaga
Matthews
May
Meeds
Michel
Miller
Mills
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Minshall
Mize
Moeller
Monagan
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Moorehead
Morgan
Morris
Morse
Morton
Mosher
Moss
Multer
Murphy, Ill.
Murphy, N. Y.
Murray
Natcher
Nedzi
Nelsen
Nix
O'Brien
O'Hara, Ill.
O'Hara, Mich.
O'Konski
Olsen, Mont.
Olson, Minn.
O'Neal, Ga.
O'Neill, Mass.
Ottinger
Passman
Patman
Patten
Pepper
Perkins
Philbin
Pickle
Pike
Poage
Poff
Powell
Price
Pucinski
Purcell
Quie
Quillen
Race
Randall
Redlin
Reid, Ill.
Reid, N. Y.
Reifel
Reinecke
Resnick
Reuss
Rhodes, Ariz.
Rhodes, Pa.
Rivers, S. C.
Rivers, Alaska
Roberts
Robison
Rodino
Rogers, Colo.

Rogers, Fla.
Rogers, Tex.
Ronan
Rooney, N. Y.
Rooney, Pa.
Roosevelt
Rosenthal
Rostenkowski
Roudebush
Roush
Rumsfeld
Satterfield
St. Germain
St. Onge
Saylor
Scheuer
Schisler
Schneebeli
Schweiker
Secrest
Selden
Senner
Shipley
Shriver
Sickles
Sikes
Sisk
Skubitz
Slack
Smith, Calif.
Smith, Va.
Springer
Stafford
Staggers
Stalbaum
Stanton
Steed
Stephens
Stratton
Stubblefield
Sweeney
Talcott
Taylor
Teague, Calif.
Teague, Tex.
Tenzer
Thompson, N. J.
Thompson, Tex.
Thomson, Wis.
Todd
Trimble
Tunney
Tuten
Udall
Ullman
Utt
Van Deerlin
Vanik
Vigorito
Vivian
Waggonner
Walker, Miss.
Walker, N. Mex.
Watkins
Watson
Watts
Weltner
Whalley
White, Idaho
White, Tex.
Whitener
Whitten
Widnall
Williams
Wilson, Bob
Wilson, Charles H.
Wolff
Wright
Wyatt
Wydler
Yates
Young
Younger
Zablocki

NAYS—1

Smith, N. Y.

NOT VOTING—40

Adams
Bonner
Brademas
Brown, Ohio
Cahill
Cameron
Carter
Colmer
Conable

Krebs
Kunkel
Laird
Landrum
Langen
Latta
Leggett
Lennon
Lipscomb
Long, La.
Long, Md.
Love
McClory
McCulloch
McDade
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McFall
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McMillan
McVicker
Macdonald
MacGregor
Machen
Mackay
Mackie
Madden
Mahon
Mailliard
Marsh
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Martin, Mass.
Martin, Nebr.
Mathias
Matsunaga
Matthews
May
Meeds
Michel
Miller
Mills
Minish
Mink
Minshall
Mize
Moeller
Monagan
Moore
Moorehead
Morgan
Morris
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Morton
Mosher
Moss
Multer
Murphy, Ill.
Murphy, N. Y.
Murray
Natcher
Nedzi
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Quillen
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Reid, N. Y.
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Resnick
Reuss
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Rhodes, Pa.
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Rivers, Alaska
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Rodino
Rogers, Colo.

Rogers, Fla.
Rogers, Tex.
Ronan
Rooney, N. Y.
Rooney, Pa.
Roosevelt
Rosenthal
Rostenkowski
Roudebush
Roush
Rumsfeld
Satterfield
St. Germain
St. Onge
Saylor
Scheuer
Schisler
Schneebeli
Schweiker
Secrest
Selden
Senner
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Udall
Ullman
Utt
Van Deerlin
Vanik
Vigorito
Vivian
Waggonner
Walker, Miss.
Walker, N. Mex.
Watkins
Watson
Watts
Weltner
Whalley
White, Idaho
White, Tex.
Whitener
Whitten
Widnall
Williams
Wilson, Bob
Wilson, Charles H.
Wolff
Wright
Wyatt
Wydler
Yates
Young
Younger
Zablocki

NAYS—1

Smith, N. Y.

NOT VOTING—40

Adams
Bonner
Brademas
Brown, Ohio
Cahill
Cameron
Carter
Colmer
Conable

Conyers	King, Calif.	Ryan
Cunningham	King, N. Y.	Schmidhauser
Diggs	Lindsay	Scott
Evins, Tenn.	McCarthy	Smith, Iowa
Green, Oreg.	Morrison	Sullivan
Hawkins	Pelly	Thomas
Hays	Pirnie	Toll
Hosmer	Pool	Tuck
Irwin	Roncalio	Tupper
Keogh	Roybal	Willis

So the bill was passed.

The Clerk announced the following pairs:

Mr. Keogh with Mr. Brown of Ohio.
Mr. Roncalio with Mr. Pelly.
Mr. Toll with Mr. Lindsay.
Mr. Colmer with Mr. Carter.
Mr. Roybal with Mr. Hosmer.
Mr. Pool with Mr. Cunningham.
Mrs. Sullivan with Mr. Tupper.
Mr. Thomas with Mr. King of New York.
Mr. Morrison with Mr. Conable.
Mr. King of California with Mr. Pirnie.
Mr. Hays with Mr. Ryan.
Mr. Brademas with Mr. Diggs.
Mr. McCarthy with Mr. Conyers.
Mr. Tuck with Mrs. Green of Oregon.
Mr. Hawkins with Mr. Irwin.
Mr. Smith of Iowa with Mr. Scott.
Mr. Evins of Tennessee with Mr. Adams.
Mr. Cameron with Mr. Bonner.
Mr. Willis with Mr. Schmidhauser.

The result of the vote was announced as above recorded.

The doors were opened.

A motion to reconsider was laid on the table.

Congressional Record—Senate

[19012]

August 10, 1965

MUTILATION OR DESTRUCTION OF DRAFT CARDS SHOULD BE A CRIMINAL OFFENSE

Mr. THURMOND. Mr. President, recently the public and officials of our country have been appalled by reports of mass public burnings of draft registration cards. It is not fitting for our country to permit such conduct while our people are giving their lives in combat with the enemy.

The law now makes it a criminal offense to forge or alter a draft registration card. Certainly it should be just as serious an offense to mutilate or destroy a draft card.

Last week, the chairman of the Armed Services Committee in the House of Representatives introduced a bill to make the mutilation or destruction of a draft card a criminal offense. In order that this matter may be expedited in the Senate, I send to the desk a similar bill and ask that it be appropriately referred. It is my hope that hearings will be held promptly and expedtiously on this proposal.

The PRESIDING OFFICER. The bill will be received and appropriately referred.

The bill (S. 2381) to amend the Universal Military Training and Service Act of 1951, introduced by Mr. THURMOND, was received, read twice by its title, and referred to the Committee on Armed Services.

PA56

Senate Report No. 589

[1]

Senate—Calendar No. 572

89th Congress—*1st Session*

PROHIBITION OF DESTRUCTION OR MUTILATION OF DRAFT CARDS

AUGUST 12, 1965.—Ordered to be printed

Mr. THURMOND, from the Committee on Armed Services, submitted the following

REPORT

[To accompany S. 2381]

The Committee on Armed Services, to which was referred the bill (S. 2381) to amend the Universal Military training and Service Act, as amended, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

AMENDMENT

The amendment is as follows:

Strike out lines 5 and 6 and substitute in place thereof the following:

SECTION 1. Section 12(b)(3) is amended to read as follows:

Senate Report No. 589

EXPLANATION OF AMENDMENT

The amendment is a technical one to correct the designation of the section to be amended.

PURPOSE

This bill would make a person who knowingly destroys or knowingly mutilates a draft registration card subject to a fine of not more than $10,000 or imprisonment of not more than 5 years, or both.

EXPLANATION OF THE BILL

Section 12(b)(3) of the Universal Military Training and Service Act of 1951, as amended, provides, among other things, that a person who forges, alters, or changes a draft registration certificate is subject to a fine of not more than $10,000 or imprisonment of not more than 5 years, or both. There is no explicit prohibition in this section against the knowing destruction or mutilation of such cards.

[2] The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies.

For a person to be subject to fine or imprisonment the destruction or mutilation of the draft card must be "knowingly" done. This qualification is intended to protect persons who lose or mutilate draft cards acidentally.

CHANGES IN EXISTING LAW

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law proposed to be made by the bill are shown as follows (new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

Senate Report No. 589

SECTION 462(b)(3) OF TITLE 50, UNITED STATES CODE

462. Offenses and penalties

(a) * * *

(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title, or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury.

Congressional Record—Senate

[19669]

August 13, 1965

AMENDMENT OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT OF 1951, AS AMENDED

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 573, H.R. 10306.

The PRESIDING OFFICER. The bill will be stated by title.

The LEGISLATIVE CLERK. A bill (H.R. 10306) to amend the Universal Military Training and Service Act of 1951, as amended.

The PRESIDING OFFICER. Is there objection to the present consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

Mr. THURMOND. Mr. President, yesterday the Senate Committee on Armed Services unanimously reported Senate bill 2381. H.R. 10306 is identical with S. 2381, as amended. Since the bills are identical, I should like to make a statement on the pending bill.

The bill amends the Universal Military Training and Service Act, which appears in the appendix to title 50 of the United States Code, to include a clear statutory prohibition against any person knowingly destroying or knowingly mutilating a draft card. The existing law already provides prohibition against the altering of a draft card as well as a number of offensives [sic] connected with the selective service registration, but there now is no specific prohibition against the willful destruction or mutilation of a draft card.

Recent incidents of mass destruction of draft cards constitute open defiance of the warmaking powers of the Government and have demonstrated an urgent need for this legislation.

The criminal prohibitions instituted by this bill would be limited to willful incidents. The prohibition would not apply to instances where draft cards were destroyed or mutilated by inadvertence.

The President has acknowledged that our country is engaged in a war. Attempts to interfere with the Universal Military Training Act or service in the Armed Forces constitute treason in time of war. Such conduct as public burnings of draft cards and public pleas for persons to refuse to register for their draft should not and must not be tolerated by a society whose sons, brothers, and husbands are giving their lives in defense of freedom and countrymen against Communist aggression.

The PRESIDING OFFICER. The bill is open to amendment. If there be no amendment to be proposed, the question is on the third reading of the bill.

The bill (H.R. 10306) was ordered to a third reading, read the third time, and passed.

Mr. MANSFIELD. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. THURMOND. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. THURMOND. Mr. President, I ask unanimous consent to postpone indefinitely further consideration of Senate bill 2381.

The PRESIDING OFFICER. Without objection, it is so ordered.

U.S.A. and LINDA STOUT et al. VS. JEFFERSON COUNTY BOARD of EDUCATION 1967

Box 414
Folder 1

Wisconsin

Please Retain Original Order

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23345

UNITED STATES OF AMERICA and LINDA STOUT, by her father and next friend, BLEVIN STOUT,

Appellants,

versus

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL,

Appellees.

No. 23331

UNITED STATES OF AMERICA,

Appellant,

versus

THE BOARD OF EDUCATION OF THE CITY OF FAIRFIELD, ET AL,

Appellees.

No. 23335

UNITED STATES OF AMERICA,

Appellant,

versus

THE BOARD OF EDUCATION OF THE CITY OF BESSEMER, ET AL.,

Appellees.

Appeals from the United States District Court for the Northern District of Alabama.

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UNITED STATES OF AMERICA,

Appellant,

versus

THE BOARD OF EDUCATION OF THE CITY OF BESSEMER, ET AL.,

Appellees.

Appeals from the United States District Court for the Northern District of Alabama.

No. 23274

UNITED STATES OF AMERICA,
Appellant,
versus

CADDO PARISH SCHOOL BOARD, ET AL.,
Appellees.

No. 23365

UNITED STATES OF AMERICA,
Appellant,
versus

THE BOSSIER PARISH SCHOOL BOARD, ET AL.,
Appellees.

No. 23173

MARGARET M. JOHNSON, ET AL.,
Appellants,
versus

JACKSON PARISH SCHOOL BOARD, ET AL.,
Appellees.

No. 23192

YVORNIA DECAROL BANKS, ET AL.,
Appellants,

versus

CLAIBORNE PARISH SCHOOL BOARD, ET AL.,
Appellees.

No. 23253

JIMMY ANDREWS, ET AL.,
Appellant,

versus

CITY OF MONROE, LOUISIANA, ET AL.,
Appellees.

Appeals from the United States District Court for the Western District of Louisiana.

No. 23116

CLIFFORD EUGENE DAVIS, JR., ET AL.,
Appellants,

versus

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITIONS FOR REHEARING EN BANC

(March 29, 1967.)

Before TUTTLE, Chief Judge, BROWN, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, and SIMPSON, Circuit Judges.

PER CURIAM: 1. The Court sitting en banc adopts the opinion and decree filed in these cases December 29, 1966, subject to the clarifying statements in this opinion and the changes in the decree attached to this opinion.

2. School desegregation cases involve more than a dispute between certain Negro children and certain

schools. If Negroes are ever to enter the mainstream of American life, as school children they must have equal educational opportunities with white children.

3. The Court holds that boards and officials administering public schools in this circuit[1] have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools. Expressions in our earlier opinions distinguishing between integration and desegregation[2] must yield to this affirmative duty we now recognize. In fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools. The necessity of overcoming the effects of the dual school system in this circuit requires integration of faculties,

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[1] "In the South", as the Civil Rights Commission has pointed out, the Negro "has struggled to get into the neighborhood school. In the North, he is fighting to get out of it." Civ. Rts. Comm. Rep., Freedom to the Free. 207 (1963).

This Court did not "excuse" neighborhood schools in the North and West which have de facto segregation. No case involving that sort of school system was before the Court.

School segregation is "inherently unequal" by any name and wherever located. But de facto segregation resulting from residential patterns in a non-racially motivated neighborhood school system has problems peculiar to such a system. The school system is already a unitary one. The difficulties lie in finding state action and in determining how far school officials must go and how far they may go in correcting racial imbalance. In such cases *Shelley v. Kraemer,* 334 U.S. 1 (1948) may turn out to be as important as *Brown.* A broad-brush doctrinaire approach, therefore, that *Brown*'s abolition of the dual school system solves all problems is conceptually and pragmatically inadequate for dealing with de facto-segregated neighborhood schools.

We leave the problems of de facto segregation in a unitary system to solution in appropriate cases by the appropriate courts.

[2] This distinction was first expressed in Briggs v. Elliott, E.D.S.C. 1955, 132 F. Supp. 776: "The Constitution, in other words, does not require integration. It merely forbids discrimination."

facilities, and activities, as well as students. To the extent that earlier decisions of this Court (more in the language of the opinion than in the effect of the holding) conflict with this view, the decisions are overruled. We refer specifically to the cases listed in footnote 2 of this opinion.[3]

4. Freedom of choice is not a goal in itself. It is a means to an end. A schoolchild has no inalienable right to choose his school. A freedom of choice plan is but one of the tools available to school officials *at this stage* of the process of converting the dual system of separate schools for Negroes and whites into a unitary system. The governmental objective of this conversion is—educational opportunities on equal terms to all. The criterion for determining the validity of a provision in a school desegregation plan is whether the provision is reasonably related to accomplishing this objective.

5. The percentages referred to in the Guidelines and in this Court's decree are simply a rough rule of thumb for measuring the effectiveness of freedom of choice as a useful tool. The percentages are not a method for setting quotas or striking a balance. If the plan is ineffective, longer on promises than performance, the school officials charged with initiating and

[3] Avery v. Wichita Falls Independent School District, 1956, 241 F.2d 230; Borders v. Rippy, 1957, 247 F.2d 268; Rippy v. Borders, 1957, 257 F.2d 73; Cohen v. Public Housing Administration, 1958, 257 F.2d 73; City of Montgomery v. Gilmore, 1960, 277 F.2d 364; Boson v. Rippy, 1960, 285 F.2d 43; Stell v. Savannah-Chatham County Board of Education, 1964, 333 F.2d 55; Evers v. Jackson, 1964, 328 F.2d 408; Lockett v. Board of Education of Muscogee County, 1965, 342 F.2d 225.

administering a unitary system have not met the constitutional requirements of the Fourteenth Amendment; they should try other tools.

6. In constructing the original and revised decrees, the Court gave great weight to the 1965 and 1966 HEW Guidelines. These Guidelines establish minimum standards clearly applicable to disestablishing state-sanctioned segregation. These Guidelines and our decree are within the decisions of this Court, comply with the letter and spirit of the Civil Rights Act of 1964, and meet the requirements of the United States Constitution. Courts in this circuit should give great weight to future HEW Guidelines, when such guidelines are applicable to this circuit and are within lawful limits. We express no opinion as to the applicability of HEW Guidelines in racially imbalanced situations such as occur in some other circuits where it is contended that state action may be found in state tolerance of de facto segregation or in such action as the drawing of attendance boundaries based on a neighborhood school system.

The Court reaffirms the reversal of the judgments below and the remand of each case for entry of the decree attached to this opinion.

The mandate will issue immediately.

CORRECTED DECREE.

It is ORDERED, ADJUDGED and DECREED that the defendants, their agents, officers, employees and successors and all those in active concert and participation with them, be and they are permanently enjoined from discriminating on the basis of race or color in the operation of the school system. As set out more particularly in the body of the decree, they shall take affirmative action to disestablish all school segregation and to eliminate the effects of the dual school system:

I.

SPEED OF DESEGREGATION

Commencing with the 1967-68 school year, in accordance with this decree, all grades, including kindergarten grades, shall be desegregated and pupils assigned to schools in these grades without regard to race or color.

II.

EXERCISE OF CHOICE

The following provisions shall apply to all grades:

(a) *Who May Exercise Choice.* A choice of schools may be exercised by a parent or other adult person serving as the student's parent. A student may exercise his own choice if he (1) is exercising a choice

for the ninth or a higher grade, or (2) has reached the age of fifteen at the time of the exercise of choice. Such a choice by a student is controlling unless a different choice is exercised for him by his parent or other adult person serving as his parent during the choice period or at such later time as the student exercises a choice. Each reference in this decree to a student's exercising a choice means the exercise of the choice, as appropriate, by a parent or such other adult, or by the student himself.

(b) *Annual Exercise of Choice.* All students, both white and Negro, shall be required to exercise a free choice of schools annually.

(c) *Choice Period.* The period for exercising choice shall commence May 1, 1967 and end June 1, 1967, and in subsequent years shall commence March 1 and end March 31 preceding the school year for which the choice is to be exercised. No student or prospective student who exercises his choice within the choice period shall be given any preference because of the time within the period when such choice was exercised.

(d) *Mandatory Exercise of Choice.* A failure to exercise a choice within the choice period shall not preclude any student from exercising a choice at any time before he commences school for the year with respect to which the choice applies, but such choice may be subordinated to the choices of students who exercised choice before the expiration of the choice

period. Any student who has not exercised his choice of school within a week after school opens shall be assigned to the school nearest his home where space is available under standards for determining available space which shall be applied uniformly throughout the system.

(e) *Public Notice.* On or within a week before the date the choice period opens, the defendants shall arrange for the conspicuous publication of a notice describing the provisions of this decree in the newspaper most generally circulated in the community. The text of the notice shall be substantially similar to the text of the explanatory letter sent home to parents. Publication as a legal notice will not be sufficient. Copies of this notice must also be given at that time to all radio and television stations located in the community. Copies of this decree shall be posted in each school in the school system and at the office of the Superintendent of Education.

(f) *Mailing of Explanatory Letters and Choice Forms.* On the first day of the choice period there shall be distributed by first-class mail an explanatory letter and a choice form to the parent (or other adult person acting as parent, if known to the defendants) of each student, together with a return envelope addressed to the Superintendent. Should the defendants satisfactorily demonstrate to the court that they are unable to comply with the requirement of distributing the explanatory letter and choice form by first-class

mail, they shall propose an alternative method which will maximize individual notice, i.e., personal notice to parents by delivery to the pupil with adequate procedures to insure the delivery of the notice. The text for the explanatory letter and choice form shall essentially conform to the sample letter and choice form appended to this decree.

(g) *Extra Copies of the Explanatory Letter and Choice Form.* Extra copies of the explanatory letter and choice form shall be freely available to parents, students, prospective students, and the general public at each school in the system and at the office of the Superintendent of Education during the times of the year when such schools are usually open.

(h) *Content of Choice Form.* Each choice form shall set forth the name and location and the grades offered at each school and may require of the person exercising the choice the name, address, age of student, school and grade currently or most recently attended by the student, the school chosen, the signature of *one* parent or other adult person serving as parent, or where appropriate the signature of the student, and the identity of the person signing. No statement of reasons for a particular choice, or any other information, or any witness or other authentication, may be required or requested, without approval of the court.

(i) *Return of Choice Form.* At the option of the person completing the choice form, the choice may

be returned by mail, in person, or by messenger to any school in the school system or to the office of the Superintendent.

(j) *Choices not on Official Form.* The exercise of choice may also be made by the submission in like manner of any other writing which contains information sufficient to identify the student and indicates that he has made a choice of school.

(k) *Choice Forms Binding.* When a choice form has once been submitted and the choice period has expired, the choice is binding for the entire school year and may not be changed except in cases of parents making different choices from their children under the conditions set forth in paragraph II (a) of this decree and in exceptional cases where, absent the consideration of race, a change is educationally called for or where compelling hardship is shown by the student. A change in family residence from one neighborhood to another shall be considered an exceptional case for purposes of this paragraph.

(l) *Preference in Assignment.* In assigning students to schools, no preferences shall be given to any student for prior attendance at a school and, except with the approval of court in extraordinary circumstances, no choice shall be denied for any reason other than overcrowding. In case of overcrowding at any school, preference shall be given on the basis of the proximity of the school to the homes of the students choosing it, without regard to race or color. Standards

for determining overcrowding shall be applied uniformly throughout the system.

(m) *Second Choice where First Choice is Denied.* Any student whose choice is denied must be promptly notified in writing and given his choice of any school in the school system serving his grade level where space is available. The student shall have seven days from the receipt of notice of a denial of first choice in which to exercise a second choice.

(n) *Transportation.* Where transportation is generally provided, buses must be routed to the maximum extent feasible in light of the geographic distribution of students, so as to serve each student choosing any school in the system. Every student choosing either the formerly white or the formerly Negro school nearest his residence must be transported to the school to which he is assigned under these provisions, whether or not it is his first choice, if that school is sufficiently distant from his home to make him eligible for transportation under generally applicable transportation rules.

(o) *Officials not to Influence Choice.* At no time shall any official, teacher, or employee of the school system influence any parent, or other adult person serving as a parent, or any student, in the exercise of a choice or favor or penalize any person because of a choice made. If the defendant school board employs professional guidance counselors, such persons shall base their guidance and counselling on the individual student's particular personal, academic,

and vocational needs. Such guidance and counselling by teachers as well as professional guidance counsellors shall be available to all students without regard to race or color.

(p) *Protection of Persons Exercising Choice.* Within their authority school officials are responsible for the protection of persons exercising rights under or otherwise affected by this decree. They shall, without delay, take appropriate action with regard to any student or staff member who interferes with the successful operation of the plan. Such interference shall include harassment, intimidation, threats, hostile words or acts, and similar behavior. The school board shall not publish, allow, or cause to be published, the names or addresses of pupils exercising rights or otherwise affected by this decree. If officials of the school system are not able to provide sufficient protection, they shall seek whatever assistance is necessary from other appropriate officials.

III.

PROSPECTIVE STUDENTS

Each prospective new student shall be required to exercise a choice of schools before or at the time of enrollment. All such students known to defendants shall be furnished a copy of the prescribed letter to parents, and choice form, by mail or in person, on the date the choice period opens or as soon thereafter as the school system learns that he plans to enroll.

Where there is no pre-registration procedure for newly entering students, copies of the choice forms shall be available at the Office of the Superintendent and at each school during the time the school is usually open.

IV.

TRANSFERS

(a) *Transfers for Students.* Any student shall have the right at the beginning of a new term, to transfer to any school from which he was excluded or would otherwise be excluded on account of his race or color.

(b) *Transfers for Special Needs.* Any student who requires a course of study not offered at the school to which he has been assigned may be permitted, upon his written application, at the beginning of any school term or semester, to transfer to another school which offers courses for his special needs.

(c) *Transfers to Special Classes or Schools.* If the defendants operate and maintain special classes or schools for physically handicapped, mentally retarded, or gifted children, the defendants may assign children to such schools or classes on a basis related to the function of the special class or school that is other than freedom of choice. In no event shall such assignments be made on the basis of race or color or in a manner which tends to perpetuate a dual school system based on race or color.

V.

SERVICES, FACILITIES, ACTIVITIES AND PROGRAMS

No student shall be segregated or discriminated against on account of race or color in any service, facility, activity, or program (including transportation, athletics, or other extracurricular activity) that may be conducted or sponsored by the school in which he is enrolled. A student attending school for the first time on a desegregated basis may not be subject to any disqualification or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer or newly assigned student except that such transferees shall be subject to longstanding, non-racially based rules of city, county, or state athletic associations dealing with the eligibility of transfer students for athletic contests. All school use or school-sponsored use of athletic fields, meeting rooms, and all other school related services, facilities, activities, and programs such as commencement exercises and parent-teacher meetings which are open to persons other than enrolled students, shall be open to all persons without regard to race or color. All special educational programs conducted by the defendants shall be conducted without regard to race or color.

VI.

SCHOOL EQUALIZATION

(a) *Inferior Schools.* In schools heretofore maintained for Negro students, the defendants shall take prompt steps necessary to provide physical facilities, equipment, courses of instruction, and instructional materials of quality equal to that provided in schools previously maintained for white students. Conditions of overcrowding, as determined by pupil-teacher ratios and pupil-classroom ratios shall, to the extent feasible, be distributed evenly between schools formerly maintained for Negro students and those formerly maintained for white students. If for any reason it is not feasible to improve sufficiently any school formerly maintained for Negro students, where such improvement would otherwise be required by this paragraph, such school shall be closed as soon as possible, and students enrolled in the school shall be reassigned on the basis of freedom of choice. By October of each year, defendants shall report to the Clerk of the Court pupil-teacher ratios, pupil-classroom ratios, and per-pupil expenditures both as to operating and capital improvement costs, and shall outline the steps to be taken and the time within which they shall accomplish the equalization of such schools.

(b) *Remedial Programs.* The defendants shall provide remedial education programs which permit students attending or who have previously attended seg-

regated schools to overcome past inadequacies in their education.

VII.

NEW CONSTRUCTION

The defendants, to the extent consistent with the proper operation of the school system as a whole, shall locate any new school and substantially expand any existing schools with the objective of eradicating the vestiges of the dual system.

VIII.

FACULTY AND STAFF

(a) *Faculty Employment.* Race or color shall not be a factor in the hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff members, including student teachers, except that race may be taken into account for the purpose of counteracting or correcting the effect of the segregated assignment of faculty and staff in the dual system. Teachers, principals, and staff members shall be assigned to schools so that the faculty and staff is not composed exclusively of members of one race. Wherever possible, teachers shall be assigned so that more than one teacher of the minority race (white or Negro) shall be on a desegregated faculty. Defendants shall take positive and affirmative steps to accomplish the desegregation of their school faculties and to achieve substantial de-

segregation of faculties in as many of the schools as possible for the 1967-68 school year notwithstanding that teacher contracts for the 1967-68 or 1968-69 school years may have already been signed and approved. The tenure of teachers in the system shall not be used as an excuse for failure to comply with this provision. The defendants shall establish as an objective that the pattern of teacher assignment to any particular school not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school.

(b) *Dismissals.* Teachers and other professional staff members may not be discriminatorily assigned, dismissed, demoted, or passed over for retention, promotion, or rehiring, on the ground of race or color. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system shall be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If, as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system shall be evaluated in selecting the staff member to be released without consideration of race or color. A report containing any such proposed dismissals, and the reasons therefor, shall be filed with the Clerk of the Court, serving copies upon opposing counsel, within five (5) days after such dismissal, demotion, etc., as proposed.

(c) *Past Assignments.* The defendants shall take steps to assign and reassign teachers and other professional staff members to eliminate the effects of the dual school system.

IX.

REPORTS TO THE COURT

(1) *Report on Choice Period.* The defendants shall serve upon the opposing parties and file with the Clerk of the Court on or before April 15, 1967, and on or before June 15, 1967, and in each subsequent year on or before June 1, a report tabulating by race the number of choice applications and transfer applications received for enrollment in each grade in each school in the system, and the number of choices and transfers granted and the number of denials in each grade of each school. The report shall also state any reasons relied upon in denying choice and shall tabulate, by school and by race of student, the number of choices and transfers denied for each such reason.

In addition, the report shall show the percentage of pupils actually transferred or assigned from segregated grades or to schools attended predominantly by pupils of a race other than the race of the applicant, for attendance during the 1966-67 school year, with comparable data for the 1965-66 school year. Such additional information shall be included in the report served upon opposing counsel and filed with the Clerk of the Court.

(2) *Report After School Opening.* The defendants shall, in addition to reports elsewhere described, serve upon opposing counsel and file with the Clerk of the Court within 15 days after the opening of schools for the fall semester of each year, a report setting forth the following information:

(i) The name, address, grade, school of choice and school of present attendance of each student who has withdrawn or requested withdrawal of his choice of school or who has transferred after the start of the school year, together with a description of any action taken by the defendants on his request and the reasons therefor.

(ii) The number of faculty vacancies, by school, that have occurred or been filled by the defendants since the order of this Court or the latest report submitted pursuant to this sub-paragraph. This report shall state the race of the teacher employed to fill each such vacancy and indicate whether such teacher is newly employed or was transferred from within the system. The tabulation of the number of transfers within the system shall indicate the schools from which and to which the transfers were made. The report shall also set forth the number of faculty members of each race assigned to each school for the current year.

(iii) The number of students by race, in each grade of each school.

EXPLANATORY LETTER

(School System Name and Office Address)

(Date Sent)

Dear Parent:

All grades in our school system will be desegregated next year. Any student who will be entering one of these grades next year may choose to attend any school in our system, regardless of whether that school was formerly all-white or all-Negro. It does not matter which school your child is attending this year. You and your child may select any school you wish.

Every student, white and Negro, must make a choice of schools. If a child is entering the ninth or higher grade, or if the child is fifteen years old or older, he may make the choice himself. Otherwise a parent or other adult serving as parent must sign the choice form. A child enrolling in the school system for the first time must make a choice of schools before or at the time of his enrollment.

The form on which the choice should be made is attached to this letter. It should be completed and returned by June 1, 1967. You may mail it in the enclosed envelope, or deliver it by messenger or by hand to any school principal or to the Office of the Superintendent at any time between May 1 and June 1. No one may require you to return your choice form before June 1 and no preference is given for returning the choice form early.

No principal, teacher or other school official is permitted to influence anyone in making a choice or to require early return of the choice form. No one is permitted to favor or penalize any student or other person because of a choice made. A choice once made cannot be changed except for serious hardship.

No child will be denied his choice unless for reasons of overcrowding at the school chosen, in which case children living nearest the school will have preference.

Transportation will be provided, if reasonably possible, no matter what school is chosen. [Delete if the school system does not provide transportation.]

Your School Board and the school staff will do everything we can to see to it that the rights of all students are protected and that desegregation of our schools is carried out successfully.

Sincerely yours,

Superintendent.

CHOICE FORM

This form is provided for you to choose a school for your child to attend next year. You have 30 days to make your choice. It does not matter which school your child attended last year, and does not matter whether the school you choose was formerly a white or Negro school. This form must be mailed or brought

to the principal of any school in the system or to the office of the Superintendent, [address], by June 1, 1967. A choice is required for each child.

Name of child .....
(Last) (First) (Middle)

Address .....

Name of Parent or other
adult serving as parent .....

If child is entering first grade, date of birth:
.....
(Month) (Day) (Year)

Grade child is entering .....

School attended last year .....

Choose one of the following schools by marking an X beside the name.

Name of School	Grade	Location
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

Signature .....

Date .....

.....

.....

To be filled in by Superintendent:

School Assigned .....[1]

[1] In subsequent years the dates in both the explanatory letter and the choice form should be changed to conform to the choice period.

GEWIN, Circuit Judge, with whom Judge Bell concurs, DISSENTING:

The opinion of the majority and the proposed decree are long, complicated, somewhat ambiguous and rather confusing. The per curiam opinion of the majority of the en banc court does not substantially clarify, modify or change anything said in the original opinion filed December 29, 1966. Only minor and inconsequential changes were made in the proposed decree.[1] In my view both the opinion and decree constitute an abrupt and unauthorized departure from the mainstream of judicial thought both of this Circuit and a number of other Circuits. I am unable to agree either with the opinion or the decree, especially those provisions dealing with the following: (1) de facto and de jure segregation; (2) the guidelines; (3) the proposed decree; (4) attendance percentages, proportions, and freedom of choice; and (5) enforced integration.

I

De Facto and De jure Segregation

The thesis of the majority, like Minerva (Athena) of the classic myths,[2] was spawned full-grown and

1 "The opinion" and "the decree" as used herein refer to the opinion and decree filed in these cases by the three judge panel on December 29, 1966, wherein two of the judges agreed and one dissented. Of necessity, references to page numbers of the opinion refer to the slip opinion.

2 See Gayley, The Classic Myths, (Rev. ed. 1939) page 23 "She sprang from the brain of Jove, agleam with panoply of war, brandishing a spear and with her battle-cry awakening the echoes of heaven and earth."

full-armed. It has no substantial legal ancestors.[3] We must wait to see what progeny it will produce.

While professing to fashion a remedy under the benevolent canopy of the Federal Constitution, the opinion and the decree are couched in divisive terms and proceed to dichotomize the union of states into two separate and distinct parts. Based on such reasoning the Civil Rights Act of 1964 is stripped of its national character, the national policies therein stated are nullified, and in effect, the remedial purposes of the Act are held to apply to approximately one-third of the states of the union and to a much smaller percentage or proportion of the total population of the country. I am unable to believe that the Congress had any such intent. If it did, a serious constitutional question would be presented as to the validity of the entire Act under our concepts of American constitutional government.

The Negro children in Cleveland, Chicago, Los Angeles, Boston, New York, or in any other area of the nation which the opinion classifies under de facto segregation, would receive little comfort from the assertion that the racial make-up of their school system does not violate their constitutional rights because

[3] However, compare the doctrine of the majority and the theme of an article in the Virginia Law Review entitled "Title VI, The Guidelines and School Desegregation in the South", by James R. Dunn. Virginia Law Review, Vol. 53, page 42 (1967). According to footnote 85 of the law review article, the majority opinion was released "as this article was going to press." Mr. Dunn is Legal Adviser, Equal Educational Opportunities Program, United States Office of Education, HEW, Washington, D.C.

they were born into a de facto society, while the exact same racial make-up of the school system in the 17 Southern and border states violates the constitutional rights of their counterparts, or even their blood brothers, because they were born into a de jure society. All children everywhere in the nation are protected by the Constitution, and treatment which violates their constitutional rights in one area of the country, also violates such constitutional rights in another area. The details of the remedy to be applied, however, may vary with local conditions. Basically, all of them must be given the same constitutional protection. Due process and equal protection will not tolerate a lower standard, and surely not a double standard. The problem is a national one.

Regardless of our decrees, in spite of our hopes and notwithstanding our disappointments, there is no infallible and certain process of alchemy which will erase decades of history and transmute a distasteful set of circumstances into a utopia of perfection. All who have studied the subject recognize that discriminatory practices did not arise from a single cause. Such practices had their origin and birth in social, economic, educational, legal, geographical and numerous other considerations. These factors tend to be self-perpetuating. We must eradicate them, and I have the faith that they will be eradicated and eliminated by responsible and responsive governmental agencies acting pursuant to the best interests of the community. There is no social antibiotic which will

effect a sudden or overnight cure. It is not possible to specifically fix the blame or to attribute the origin of discriminatory practices to isolated causes, and it is surely inappropriate to undertake to fasten guilt upon any segment of the population. In this area of our nation's history eminent historians still disagree as to causes and effects. Some studies have placed emphasis on the slave trader or the importer of slaves, others have blamed the slave holder, while others have tried to trace the guilt back to tribal chieftans in Africa. Perhaps the most common understanding amongst all the historians and students of the problem is the conclusion that causes cannot be isolated and responsibility cannot be limited to a particular group. Whatever the cause or explanation, it is clear that the responsibility rests on many rather than few.

At this time, almost 13 years after the decisions in *Brown v. Board of Education* (1954) 347 U.S. 483, 98 L.ed. 873 (*Brown I*) and *Brown v. Board of Education* (1955) 349 U.S. 294, 99 L.ed. 1083 (*Brown II*), there should be no doubt in the minds of anyone that compulsory segregation in the public school systems of this nation must be eliminated. Negro children have a personal, present, and unqualified constitutional right to attend the public schools on a racially nondiscriminatory basis.

Although espousing the cause of uniformity and asserting there must not be one law for Athens and another for Rome, the opinion does not follow that thesis or principle. One of the chief difficulties

which I encounter with the opinion is that it concludes that the Constitution means one thing in 17 states of the nation and something else in the remaining states. This is done by a rather ingenious though illogical distinction between the terms de facto segregation and de jure segregation. While the opinion recognizes the evils common to both types, it relies heavily on background facts to justify the conclusion that the evil will be corrected in one area of the nation and not in the other. In my view the Constitution cannot be bent and twisted in such a manner as to justify or support such an incongruous result. The very subject matter under consideration tends to nullify the assertion that the constitutional prohibition against segregation should be applied in 17 states and not in the rest of the nation.

Legislative history clearly supports the idea that no distinction should be made with respect to the various states in dealing with the problem. Senator Pastore was one of the principal spokesmen who handled this legislation. He gave the following explanation:

> "Frankly I do not see how we could have gone any further, to be fair . . . Section 602 of Title VI, not only requires the agency to promulgate rules and regulations, but all procedure must be in accord with these rules and regulations. They must have broad scope. They must be national. They must apply to all fifty states. We could not

draw one rule to apply to the State of Mississippi, another rule to apply to the State of Alabama, and another rule to apply to the State of Rhode Island. There must be only one rule, to apply to every state. Further, the President must approve the rule." (110 Cong. Rec. 7059, April 7, 1964)

* * *

"MR. PASTORE. . . We must do what Title VI provides; and we could do it in no milder form than that now provided by Title VI. The Senator from Tennessee says, 'Let us read this title'. I say so, too. When we read these two pages, we understand that the whole philosophy of Title VI is to promote voluntary compliance. It is written right in the law. There shall be the voluntary compliance as the first step, and then the second step they must inaugurate and promulgate, rules that have a national effect, not a local effect. They shall apply to Tennessee, to Louisiana, to Rhode Island, in equal fashion." (110 Cong. Rec. 7066, April 7, 1964)

In connection with the distinction which the opinion undertakes to make, it is pertinent to observe the following strong and unequivocal pronouncement in the very beginning of the decision in *Brown II:*

"All provisions of *federal, state, or local* law requiring or permitting such discrimination must yield to this principle. There remains

> for consideration the manner in which relief is to be accorded." (Emphasis added) (page 298)

It should be observed that all public school segregation was de jure in the broad sense of that term prior to the first *Brown* decision, in that segregation was permitted, if not required, by law.

It is undoubtedly true that any problem which reaches national proportions is often generated by varying and different customs, mores, laws, habits and manners. Such differences in the causes which contributed to the creation and existence of the problem in the first instance, do not justify the application of a fundamental constitutional principle in one area of the nation and a failure to apply it in another.

While all the authorities recognize the existence and operation of different causes in the historical background of racial segregation, there are also marked similarities. This fact is noted in the recently released study by the United States Commission on Civil Rights, RACIAL ISOLATION IN THE SCHOOLS, 1967, Vol. I (pp. 39, 59-79). In discussing the subject the following observation is made early in the report:

> "Today it [racial isolation or segregation] is attributable to remnants of the dual school system, methods of student assignment, residential segregation, and to those discretion-

> ary decisions *familiar in the North*—site selection, school construction, transfers, and the determination of where to place students in the event of overcrowding." (Emphasis added)

In its summary the Commission notes that the causes of racial isolation or school segregation are complex and self-perpetuating. It speaks of the *Nation's* metropolitan areas and refers to social and economic factors as well as geographical ones. According to the summary, not only do *state* and *local* governments share the blame, it is categorically asserted that "The *Federal Government* also shares in this responsibility." (Emphasis added) Pertinent similarities in the problem, applicable to the entire nation, are forcefully asserted in the final sentence of the Commission's Summary:

> "*In the North,* where school segregation was not generally compelled by law, these [discriminatory] policies and practices have helped to increase racial separation. *In the South,* where until the Brown decision in 1954 school segregation was required by law, *similar policies and practices* have contributed to its perpetuation." (Emphasis added)

By a process of syllogistic reasoning based on fatally defective major premises the opinion has distorted the meaning of the term segregation and has segmented its meaning into de facto and de jure segregation. All segregation in the South is classified as

de jure[4] while segregation in the North is classified as de facto. Different rules apply to the different types of segregation. The South is heavily condemned. The opinion approaches the problem on a sectional basis and fails to consider the subject except on a sectional or regional basis. There are many references to "the eleven" Southern states and "the seven" border states. This area of the nation is variously characterized as "The eleven states of the Confederacy," "the entire region encompassing the southern and border states", "wearing the badge of slavery", and "arpartheid". Finally, the opinion concludes that the two types of segregation are different, have different origins, create different problems and require different corrective action. It is suggested that there is no present remedy for de facto segregation but that the problems and questions arising from de facto segregation may someday be answered by the Supreme Court.[5]

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4 At one place in the opinion *pseudo* de facto segregation in the South is mentioned, but it is asserted that any similarity between pseudo de facto segregation in the South and actual de facto segregation in the North is more apparent than real. (p. 68)

5 The case of Blocker v. Bd. of Educ. of Manhasset, N.Y. (E.D. N.Y. 1964) 226 F. Supp. 208 cited and relied on by the majority does not support the de facto-de jure distinction. In fact Judge Zavatt disavows any such distinction. The following is from the opinion:

> "On the facts of this case, the separation of the Negro elementary school children is segregation. It is segregation by law—the law of the School Board. In the light of the existing facts, the continuance of the defendant Board's impenetrable attendance lines amounts to nothing less than state imposed segregation."
>
> * * *
>
> "This segregation is attributable to the State. The prohibitions of the Fourteenth Amendment 'have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that ac-

This Court, and the district courts within the six states embraced within our jurisdiction like many other federal courts of the nation have given much time and attention to the solution of the problems arising after the *Brown* decisions. Much has been accomplished, much remains to be done. It is not possible for me to join in the expressions of pessimism contained in the opinion or to approve the insinuations that the courts have failed in the performance of their duty.[6] Even Congress is taken to task for failure to act earlier and for failure to recognize

tion may be taken. * * *Whoever, by virtue of public position under a State government, * * * takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.' Ex Parte Virginia, 100 U.S. 339, 346-347, 25 L.Ed. 676,679 (1880). 'The situation here is in no different posture because the members of the School Board and the Superintendent of Schools are local officials; from the point of view of the Fourteenth Amendment, they stand in this litigation as the agents of the State.' Cooper v. Aaron, supra, 358 U.S. at 16, 78 S.Ct. at 1408, 3 L.ed.2d 5."

6 See for example the following statements from the opinion:

"The courts acting alone have failed." (p. 7)

* * *

"Quantatively, the results were meager." (p. 20-21)

* * *

"And most judges do not have sufficient competence—they are not educators or school administrators—to know the right questions, much less the right answers." (p. 24)

* * *

"In some cases there has been a substantial time-lag between this Court's opinions and their application by the district courts. In certain cases—which we consider unnecessary to cite—there has even been a manifest variance between this Court's decision and a later district court decision. A number of district courts still mistakenly assume that transfers under Pupil Placement Laws—superimposed on unconstitutional initial assignment—satisfy the requirements of a desegregation plan." (p. 36)

school desegregation "as the law of the land."[7] In the *Brown* cases the Court clearly and wisely recognized the fact that those decisions had changed the law which had been in effect for decades. Due notice was taken of the fact that the new order of the day would "involve a variety of local problems." The court recognized "the complexities arising from the transition to a system of public education freed of racial discrimination." Moreover, the Court stated, "Full implementation of these constitutional principles may require solution of varied local school problems." The courts were instructed to be "guided by equitable principles," to give consideration to "practical flexibility in shaping remedies" and observed that equity courts have a peculiar "facility for adjusting and reconciling public and private needs." The *Brown* decisions emphasized the concept that courts of equity are particularly qualified to shape such remedies as would "call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles" pronounced in the first *Brown* decision. Contrary to the tone and expressions of the majority opinion, the Supreme Court early announced the policy of heavy reliance on the district courts and that policy has continued to this date.

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[7] See item (5), page 24 of the opinion:

"(5) But one reason more than any other has held back desegregation of public schools on a large scale. This has been the lack, until 1964, of effective congressional statutory recognition of school desegregation as the law of the land."

II

Guidelines

With respect to the guidelines, it should be noted that they were not an issue presented to the District Court. The cases here involved had been tried in the respective district courts, appeals taken to this Court and were pending on the docket of this Court before the 1966 Guidelines were promulgated. Guidelines were not made an issue by the pleadings or otherwise in the district courts and no evidence was taken with respect to them. The issue of the guidelines are before this Court because the Court, sua sponte, brought the issue before it.[8] In my view their validity is not an issue to be decided in this Court. See *United States v. Petrillo* (1947) 332 U.S. 1,5,6; *United States v. International Union* (1957) 352 U.S. 567,590; *Connor v. New York Times* (5 Cir. 1962) 310 F.2d 133, 135; *Gibbs v. Blackwell* (5 Cir. 1965) 354 F.2d 469,471.

In its first approach to the question the Court indicated that it would not pass upon the constitutionality of the guidelines but would give weight to or rely upon them as a matter of judicial policy. When con-

[8] See opinion, page 10, footnote 13.
It should be noted that when the panel which originally heard this case invited briefs no mention was made of any constitutional question or issue with respect to the HEW guidelines. Rather, the questions posed related to whether it was "permissible and desirable" for the court to give weight to or rely on the guidelines; and if so, what practical means or methods should be employed in making use of the guidelines. From the questions raised by the court, counsel could not have gained the impression that the court was to make a full scale determination of the constitutional questions involved.

fronted with the fact that the guidelines were not approved by the President as required by the Civil Rights Act of 1964, the opinion then concluded that they do not constitute or purport to be rules or regulations or orders of general application. It was then stated that since they were not a rule, regulation or order, they constitute "a statement of policy", and while HEW "is under no statutory compulsion to issue such statements" it was decided that it is "of manifest advantage" to the general public to know the basic considerations which the Commissioner uses "in determining whether a school meets the requirements for eligibility to receive financial assistance." Immediately the opinion recognizes the inherent unfairness and vices of such pronouncements of administrative policy without an evidentiary hearing. "The guidelines have the vices of all administrative policies established unilaterally without a hearing."[9] Finally, the opinion concludes that the guidelines are fully constitutional, recognizing as it is bound to do, that a failure to comply with them cuts the purse strings and closes the treasury to all who fail to comply:

> "The great bulk of the school districts in this circuit have applied for federal financial assistance and therefore operate under voluntary desegregation plans. Approval of these plans by the Office of Education qualifies the schools for federal aid. *In this opinion we have held that the HEW Guidelines now in effect are constitutional and are within the statutory authority created in the Civil Rights*

[9] See opinion page 30.

> *Act of 1964.* Schools therefore, in compliance with the Guidelines can in general be regarded as discharging constitutional obligations." (Emphasis added) (p. 112)

Whether viewed from a substantive or procedural point of view, due process and sound judicial administration require, at the very least, an evidentiary hearing on a matter so vital to so many people.[10] Not only are numerous people affected, but those most affected are the school children of the nation. The most vital segment of our democratic society is our school system. The operation and administration of the public school systems of this nation are essentially a local business. It is unthinkable that matters that so vitally affect this phase of the national welfare should be decided in such summary fashion. In the

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[10] The 1966 Guidelines were promulgated on March 7, 1966, after these cases were docketed in this Court. The fact that the appellees had no opportunity to have a hearing and that the guidelines were unilaterally issued without receipt of evidence from the numerous school districts was called to the attention of this Court by one of the briefs for appellees:

> "As pointed out in detail below, the Constitutional and legislative principles applicable to the expenditures of federal funds, the legislative and administrative discretion placing conditions upon the receipt and use thereof, the lack of due process in the adoption thereof and the lack of any opportunity to be heard by those affected thereby all render such Guidelines inapplicable to the pending cases."
>
> * * *
>
> "The 1966 Guidelines (as well as the 1965 Guidelines) were not approved by the President. They were issued by the Office of Education unilaterally without an opportunity for the representatives of the thousands of school districts affected thereby to be heard. As unilateral directives they have not been subject to judicial review."

See consolidated brief Jefferson County Board of Education, pp. 76-77.

two most recent pronouncements by the Supreme Court dealing with the problem of segregation as related to faculty and staff, that Court refused to act without an evidentiary hearing. In both decisions the cases were remanded to the district court "for evidentiary hearings." *Bradley v. School Bd. of Richmond* (1965) 382 U.S. 103, 15 L.ed.2d 187; *Rogers v. Paul* (1965) 382 U.S. 198, 15 L.ed.2d 265. Similarly, in *Calhoun v. Latimer* (1964) 377 U.S. 263, 12 L.ed.2d 288, the Court had for consideration a desegregation plan of the Atlanta Board of Education. During the argument before the Supreme Court counsel for the Board of Education informed the Court that subsequent to the decision of the lower court, the Board had adopted additional provisions authorizing "free transfers with certain limitations in the city high schools". The petitioners contended that the changes did not meet constitutional standards and asserted that with respect to elementary students the changed plan would not achieve desegregation until sometime in the 1970's. The Supreme Court did not "grasp the nettle" but vacated the order of the lower court and remanded the case to "be appraised by the district court in a *proper evidentiary hearing.*" (Emphasis added)

III

Decree

I now come to a consideration of the decree ordered to be entered and its relation to the opinion. It is impossible to consider the decree and the opinion sep-

arately; they are inextricably interwoven. Neither takes into account "multifarious local difficulties", and therefore, any particular or peculiar local problems are submerged and sacrificed to the apparent determination, evident on the face of both the opinion and the decree, to achieve percentage enrollments which will reflect the kind of racial balance the opinion seeks to achieve.

The opinion asserts that uniformity must be achieved forthwith in everyone of the six states embraced within the Fifth Circuit. No consideration is given to any distinction in any of the numerous school systems involved. Urban schools, rural ones, small schools, large ones, areas where racial imbalance is large or small, the relative number of Negro and white children in any particular area, or any of the other myriad problems which are known to every school administrator, are taken into account. All things must yield to speed, uniformity, percentages and proportional representation. There are no limitations and there are no excuses. This philosophy does not comport with the philosophy which has guided and been inherent in the segregation problem since *Brown II*. As the Court there stated:

> "Because these cases arose under *different local conditions* and their disposition will involve a variety *of local problems,* we required further *argument* on the question of relief." (p. 298) (Emphasis added)

See also *Davis v. Bd. of Comm. of Mobile Co., Ala.*, 322 F.2d 356 (5 Cir. 1963) wherein this Court made a distinction in the rural and urban schools of Mobile County, Alabama. We held:

> "The District Court may modify this order to defer desegregation of rural schools in Mobile County until September 1964, should the District Court after further hearing conclude that special planning of administrative problems for rural schools in the county make it impracticable for such schools to start desegregation in September 1963."

The effectiveness of the district courts has been seriously impaired, in a real sense, contrary to the teachings of all the decisions of the Supreme Court since *Brown II*. Under the opinion and decree a United States District Judge serves essentially as a referee, master, or hearing examiner. Now his only functions are to order the enforcement of the detailed, uniform, stereotyped formal decree, to supervise compliance with its detailed provisions as therein ordered and directed, and to receive periodic reports much in the same fashion as reports are received by an ordinary clerk in a large business establishment.

Such a detailed decree on the appellate level not only violates sound concepts of judicial administration, but it violates a longstanding philosophy of the federal judicial system, and indeed all judicial systems common to this country, which vest wide dis-

cretion and authority in trial courts because of their closeness to and familiarity with local problems. See the opinions in *Brown II, Bradley, Rogers,* and *Calhoun.* For example, in *Brown II* the Court stated:

> "Full implementation of these constitutional principles may require solution of *varied local school* problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of *their proximity to local conditions* and the possible need for further hearings, *the courts which originally heard these cases can best perform this judicial appraisal.* Accordingly, we believe it appropriate to remand the cases to those courts.
>
> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been *characterized by a practical flexibility* in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of *these traditional attributes of equity power.* At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a *variety of obstacles* in making the transition to

school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision." (Emphasis added)

The opinion asserts that "most judges" do not possess the necessary competence to deal with the questions presented, and do not "know the rights questions, much less the right answers." Notwithstanding the foregoing assertion, the judges of the majority, acting on the appellate level, proceed to fashion a decree of such minute detail and specificity as to remove all discretion and authority from the district judges on whom the Supreme Court has relied so heavily. In my view the district judges are in much better position to know the questions and the answers than appellate judges who necessarily function some distance away from an evidentiary hearing and are removed from the "multifarious local problems" and "the variety of obstacles" inherent in the solution of the issues presented.

IV

Percentages, Proportions and Freedom of Choice

Freedom of choice means the unrestricted, uninhibited, unrestrained, unhurried, and unharried right to choose where a student will attend public school subject only to administrative considerations which do not take into account or are not related to considerations of race. If there is a free choice, free in every sense of the word, exercised by students or by their parents, or by both, depending on the circumstances, in accordance with a plan fairly and justly

administered for the purpose of eliminating segregation, the dual school system as such will ultimately disappear. *Goss v. Board of Education,* 373 U.S. 683 (1963); *Bradley v. School Board,* 345 F.2d 310,318 (4 Cir. 1965), vacated and remanded on other grounds, 382 U.S. 108 (1965 per curiam). See also *Clark v. Board of Educ. of Little Rock,* 369 F.2d 661 (8 Cir. 1966); *Deal v. Cincinnati Bd. of Educ.,* 369 F.2d 55,59 (6 Cir. 1966); *Lee, et al. v. Macon County Board of Education, et al.* (D.C. M.D. Ala. 1967) C.A. 604-E, ... F. Supp. ..... If the completely free choice is afforded and neither the students nor their parents desire to change the schools the students have heretofore attended, this Court is without authority under the Constitution or any enactment of Congress to compel them to make a change. Implicit in freedom of choice is the right to choose to remain in a particular school, perhaps the school heretofore attended. That in itself is the exercise of a free choice. The fact that Negro children may not choose to leave their associates, friends, or members of their families to attend a school where those associates are eliminated does not mean that freedom of choice does not work or is not effectively afforded. The assertion by the majority that "the only school desegregation plan that meets Constitutional standards is one that works" as interpreted by that opinion, simply means that students and parents will not be given a free choice if the results envisioned by the majority are not actually achieved. There must be a mixing of the races according to majority philosophy even if such mixing can only be achieved under the lash of compul-

sion. If the percentage of Negro and white children attending a particular school does not conform to the percentage of Negro and white school population prevalent in the community, the majority concludes that the plan of desegregation does not work. Accordingly, while professing to vouchsafe freedom and liberty to Negro children, they have destroyed the freedom and liberty of all students, Negro and white alike. There must be a mixing of the races, or integration at all costs, or the plan does not work according to the opinion. Such has not been and is not now the spirit or the letter of the law.

The aim and attitude of the majority is reflected by the following statement:

> "In reviewing the effectiveness of an approved plan it seems reasonable to use some sort of yardstick or objective percentage guide. The percentage requirements in the Guidelines are modest, suggesting only that systems using free choice plans for at least two years should expect 15 to 18 per cent of the pupil population to have selected desegregated schools."

Further the Court equates the percentage attendance test with percentages in jury exclusion[11] cases and

[11] One of the leading and most recent cases on jury exclusion is Swain v. Alabama (1965) 380 U.S. 202, 13 L.ed.2d 759. With respect to proportional representation on juries the Court concluded:

> "Venires drawn from the jury box made up in this manner unquestionably contained a smaller proportion

voter registration cases. It should be pointed out that such cases had no element of free choice in them, and therefore, the comparison is inapposite. In the instant cases the majority condemns a free choice plan unless it achieves the percentage result which suits the majority. Accordingly, the opinion concludes:

> "Percentages have been used in other civil rights cases. A similar inference may be drawn in school desegregation cases, when the number of Negroes attending school with white children is manifestly out of line with the ratio of Negro school children to white school children in public schools. Common sense suggests that a gross discrepancy between the ratio of Negroes to white children in a school and the HEW percentage guides raises an inference that the school plan is not working as it should in providing a unitary, integrated system."

There is no constitutional requirement of proportional representation in the schools according to race.

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of the Negro community than of the white community. But a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which the petit jurors are drawn." (p. 208)

Further, the Court in *Swain* quoted with approval the following statement from Cassell v. Texas, 339 U.S. 282, 286-287, 94 L.ed. 839, 847:

> "Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color, proportional limitation is not permissible."

Furthermore, since there can be no exclusion based on race, proportional limitation is likewise impermissible under the Constitution.

We should be concerned with the elimination of discrimination on account of race, and freedom of choice is one means of accomplishing that goal. It is not our function to condemn the children or the school authorities because the free choices actually made do not comport with our own notions of what the choices should have been. When our concepts as to proportions and percentages are imposed on school systems, notwithstanding free choices actually made, we have destroyed freedom and liberty by judicial fiat; and even worse, we have done so in the very name of that liberty and freedom we so avidly claim to espouse and embrace. Our duty in seeking to eliminate racial discrimination is to vouchsafe to all children, regardless of race, a full, complete and timely free choice of schools in appropriate cases in keeping with sound administrative practices which take into consideration proper criteria. Both proportional representation and proportional limitation are equally unconstitutional.

V

Enforced Integration

The opinion seeks to find a Congressional mandate requiring compulsory or enforced integration in the public schools as distinguished from the elimination of segregation. Throughout the opinion there appear

a tangled conglomeration of words and phrases of various shades of meaning, all of which are equated with each other to reach the conclusion desired by the majority that school boards in this Circuit must adopt and implement a plan of forced integration.

It seems appropriate to return to the Civil Rights Act of 1964 and the legislative history which spawned its enactment in order to ascertain the true Congressional intent. Section 401(b), 42 U.S.C.A. § 2000c(b) defines desegregation in unequivocal terms:

> " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

Section 407(a)(2) of Title IV, Title 42 § 2000c-6(a)(2) provides as follows:

> ". . .provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such *racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.*" (Emphasis added)

It should be noted that the portion of the language of the proviso which is underscored is omitted in the court's opinion. As to enforced integration the following statement by Senator Humphrey is exactly in point:

> "Mr. Humphrey. . .I should like to make one further reference to the *Gary* case. This case makes it quite clear that while the Constitution prohibits segregation, it does not require integration. . .The bill does not attempt to integrate the schools but it does attempt to eliminate segregation in the schools. . .The fact that there is a racial imbalance per se is not something which is unconstitutional. That is why we have attempted to clarify it with the language of Section 4." (110 Congressional Record 12717)

Likewise with respect to Section 407(a)(2) Senator Humphrey's statement clarifies and makes plain the Congressional intent by referring to the *Gary* case.[12]

The following additional excerpts from the legislative history serve to clarify the intent of Congress. Congressman Celler, Chairman of the Judiciary Committee of the House and Floor Manager of the bill:

> "There is no authorization for either the Attorney General or the Commissioner of Edu-

[12] Bell v. School City of Gary, Indiana, 213 F. Supp. 819 (1963).

cation to work toward achieving racial balance in given schools." (110 Congressional Record 1519, January 31, 1964)

Senators Byrd and Humphrey:

"MR. BYRD of West Virginia. But would the Senator from Minnesota also indicate whether the words 'provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance' would preclude the Office of Education, under section 602 or Title VI, from establishing a requirement that school boards and school districts shall take action to relieve racial imbalance wherever it may be deemed to exist?

"MR. HUMPHREY. Yes, I do not believe in duplicity. I believe that if we include the language in Title IV, it must apply throughout the Act." (110 Congressional Record, Page 12715, June 4, 1964).

Senator Javits:

"MR. JAVITS. . .Taking the case of the schools to which the Senator is referring, and the danger of envisaging the rule or

regulation relating to racial imbalance, it is negated expressly in the bill, which would compel racial balance. Therefore there is no case in which the thrust of the statute under which the money would be given would be directed toward restoring or bringing about a racial balance in the schools. If such a rule were adopted or promulgated by a bureaucrat, and approved by the President, the Senator's State would have an open and shut case under Section 603. That is why we have provided for judicial review. The Senator knows as a lawyer that we never can stop anyone from suing, nor stop any Government official from making a fool of himself, or from trying to do something that he has no right to do, except by remedies provided by law. So I believe it is that set of words which is operative." (110 Congressional Record, Page 12717, June 4, 1964).

Senators Byrd and Humphrey:

"MR. BYRD of West Virginia. . .Cannot the Office of Education, pursuant to carrying out this regulation, deny assistance to school districts wherein racial imbalance exists?

MR. HUMPHREY. Let me read from the substitute: Provided, that nothing herein shall empower any official or court of the United States to issue any order.

MR. BYRD of West Virginia. 'To issue any order', but does it provide that the Office of Education shall not cut off Federal assistance?

MR. HUMPHREY. But in order to cut off Federal assistance, the President would have to issue the order, if the Senator will read Section 602.

MR. BYRD of West Virginia. The words are: No such rule, regulation, or order shall become effective unless and until approved by the President.

MR. HUMPHREY. That is correct.

MR. BYRD of West Virginia. What assurance does the Senator give me that the President will not approve such a requirement?

MR. HUMPHREY. Because I do not believe the President will violate the law." (110 Congressional Record, Page 12715, June 4, 1964).

In order to escape the clear meaning of the quoted statutes and the unquestioned intent of Congress as illustrated by the legislative history, the opinion summarily obliterates any distinction between desegregation and integration. Within the context of the opinion integration means forced or enforced integration. Again the term integration is applied only to *de jure* segregated schools. An analysis of the opinion demon-

strates that the process of reasoning used amounts to an unauthorized insertion of the word "de jure" to achieve and maintain the de facto and de jure distinction with which I dealt earlier. By means of this device the opinion converts the Civil Rights Act of 1964 into a new and different concept entirely foreign to its true meaning. I quote several typical excerpts from the opinion:

> "We use the terms 'integration' and 'desegregation' of formerly segregated public schools to mean the conversion of a *de jure* segregated dual system to a unitary, nonracial (nondiscriminatory) system—lock, stock, and barrel: students, faculty, staff, facilities, programs, and activities." (Emphasis added) (footnote 5, page 6)
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> * * *
>
> *"The national policy is plain: formerly de jure segregated public school systems based on dual attendance zones must shift to unitary nonracial systems—with or without federal funds."* (Emphasis in orig.) (page 14)
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> * * *
>
> "Although the legislative history of the statute shows that the floor managers for the Act and other members of the Senate and House cited and *quoted these two opinions* they did so within the context of the problem of *de facto segregation.*" (Emphasis added) (Page 39) [The two cases mentioned are *Briggs* and *Bell.*]
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> * * *

> "As used in the Act, therefore, 'desegregation' refers only to the disestablishment of segregation *in de jure segregated schools.*" (Emphasis added) (page 74)
>
> * * *
>
> "Senator Humphrey spoke several times in the language of *Briggs* but his references to *Bell* indicate that the restrictions in the Act were pointed at the Gary, Indiana *de facto type of segregation.*" (Emphasis added) (page 80)

Again it should be said that it is not easy to understand the reasoning by which the majority concludes that the Federal Constitution requires integration of formerly *de jure* school systems but does not require the integration of de facto systems. Apparently faced with this dilemma the majority realized that it must challenge the jurisprudence established by *Briggs v. Elliott* (E.D. S.C. 1955) 132 F. Supp. 776, and *Bell v. School City of Gary* (N.D. Ind. 1963) 213 F. Supp. 819, affirmed 324 F.2d 209 (7 Cir. 1963). The opinion refers to these cases as "two glosses on Brown". The repeated assertions of Senators showing their reliance upon the two decisions in question give emphasis to the meaning of the teaching of those two cases. Senator Humphrey actually stated that the thrust of Judge Beamer's opinion in the *Gary* case was incorporated into the Civil Rights Act of 1964.[13] The majority disposes of Senator Humphrey's comment and the *Gary* case by asserting that the school

[13] See opinion page 81.

districts were drawn without regard to race. The following is from the opinion:

> "Senator Humphrey spoke several times in the language of *Briggs* but his references to *Bell* indicate that the restrictions in the Act were pointed at the Gary, Indiana de facto type of segregation." (opinion page 80)

While it may be true that the facts in *Gary* showed good faith on the part of the school board, it is likewise true that the Gary school system involved de jure segregation within the meaning of the majority opinion. We quote from Judge Beamer's opinion, 213 F. Supp. at 822:

> "Prior to 1949, Gary had segregated schools in what is commonly known as the Pulaski Complex. Two schools were built on the same campus, one was called Pulaski-East and the other Pulaski-West. One was occupied by Negro students and the other by white students. This was in accordance with the separate but equal policy, then permitted by Indiana law, (Burns Indiana Statutes Annotated, 1948 Replacement, Section 28-5104)"

The difficulty of the majority is further increased by virtue of the fact that Judge Beamer cited cases which uphold the *Briggs* doctrine. More important, when the case was affirmed by the Court of Appeals of the Seventh Circuit, the so-called *Briggs* dictum

was cited as authority for the court's holding, 324 F.2d at 213.

If the alleged *Briggs* dictum is so clearly erroneous and constitutionally unsound, it is difficult to believe that it would have been accepted for a period of almost twelve years and quoted so many times. Even the majority concedes that the court in *Briggs* was composed of distinguished jurists, Judges Parker, Dobie and Timmerman. If the majority is correct, it is entirely likely that never before have so many judges been misled, including judges of this Court,[14] for so long by such a clear, understandable, direct and concise holding as the language in *Briggs* which the opinion now condemns. The language is straightforward and simple: "The Constitution, in other words, does not require integration. It merely forbids discrimination."

It is interesting also to observe that the Supreme Court has never disturbed the *Briggs* language, although it has had numerous opportunities to do so. As a matter of fact, it has come very close to approving it; if it has not actually done so. In the case of *Shuttlesworth v. Birmingham* (N.D. Ala. 1958) 162 F. Supp. 372,378, the district court speaking through Judge Rives quoted the *Briggs* opinion. The Supreme Court affirmed the judgment. *Shuttlesworth v. Birmingham,* 358 U.S. 101.

The majority rule requiring compulsory integration is new and novel, and it has not been accepted

[14] See the very clear dissenting opinion of Judge Cox.

by the Supreme Court or by the other Circuits. The rationale of *Briggs* has been approved. *Brown* decisions, *supra; Goss v. Bd. of Educ. of Knoxville, supra; Bolling v. Sharpe,* 347 U.S. 497,498; *Pennsylvania v. Board of Trusts,* 353 U.S. 230,231; *Cooper v. Aaron,* 358 U.S. 1 (passim); *Scull v. Virginia,* 359 U.S. 344,346; *Wolfe v. North Carolina,* 364 U.S. 177,182; *Gomillion v. Lightfoot,* 364 U.S. 339,349; *Garner v. Louisiana,* 368 U.S. 157,178; *Turner v. City of Memphis,* 369 U.S. 350,353; *Johnson v. Virginia,* 373 U.S. 61,62; *Wright v. Rockefeller,* 376 U.S. 52, 57-58; *Springfield v. Barksdale* (1 Cir. 1965) 348 F.2d 261; *Bradley v. School Board of Richmond, Va.* (4 Cir. 1965) 345 F.2d 310; *Swann v. Charlotte-Mecklenburg Board of Educ.* (4 Cir. 1966) 369 F.2d 29; *Deal v. Cincinnati Board of Educ.* (6 Cir. 1966) 369 F.2d 55; *Bell v. School City of Gary, Indiana* (7 Cir. 1963) 324 F.2d 209; *Clark v. Board of Educ. of Little Rock* (8 Cir. 1966) 366 F.2d 661; *Downs v. Board of Educ. of Kansas City* (10 Cir. 1964) 336 F.2d 988, cert. den., 380 U.S. 914.

Conclusion

It is my judgment that the de facto-de jure distinction created in the opinion can not be supported as a matter of law. Percentage or proportional enrollment requirements based on race, and enforced integration are in violation of well established constitutional concepts in my opinion.

While it cannot be denied there has been recalcitrance and resistance to desegregation as required

by the *Brown* decisions in numerous areas, I cannot share in the pessimism expressed in the opinion. Throughout the country a substantial effort has been made to eliminate segregation and substantial progress has been made. The *Brown* decisions contemplated some difficulties and complexities. A review of the history of the difficulties involved strongly indicate that the greatest problems arise when a start or "break through" is initiated. Recalcitrance and resistance which appeared initially in many areas have now subsided or disappeared. It is also true that the emphasis has shifted properly from "deliberate" to "speed". I continue to have confidence in the local school boards of the nation. While some of them have performed slowly and a few have not performed at all, the vast majority of school boards are composed of conscientious, civic minded, sincere people who are undertaking to do what is best for the school children of the nation. We should not interfere with them unduly.

Furthermore, I continue to have confidence in the judicial system of the country and hold the firm belief that the record of the courts in achieving compliance with the *Brown* decisions demonstrates that the courts have given their prompt, careful and diligent attention to the problems as they have arisen. In my view the heaviest burden has been on the district courts, and inevitably the best solutions will come at the district court level where the judges are in close contact with local complexities, obstacles and problems. The primary responsibility should be left where the *Brown* decisions placed it, with the boards of education under the supervision and guid-

ance of the district courts. This is not to say that the courts should not accord full consideration to the expertise of the Department of Health, Education and Welfare; and we should give due consideration to HEW Guidelines when it is appropriate to do so. However, the provisions of the Civil Rights Act of 1964 should not be by-passed. Rules, regulations and orders of general application should be enacted in accordance with the requirements of due process and school systems should not be penalized by such rules, regulations or orders which are not approved by the President as provided by the Act. It is no answer to say that the guidelines are interpretive regulations or "housekeeping" rules. They are being used and applied as general rules, regulations or orders.

Due to developments in the jurisprudence, particularly with respect to desegregation of faculty and staff, the orders of the district courts should be vacated and the causes remanded for further consideration and for evidentiary hearings in the district courts. In effect the appellees recognize the fact that this must be done. We should not reverse the district courts on questions which were not issues before them and fashion our own decree with respect to such issues without any evidentiary basis or without affording an opportunity for the presentation of evidence relating to such issues in the district courts.

Judge BELL, with whom Judge GEWIN joins, DISSENTING:

I respectfully dissent. The two-judge or original opinion of December 20, 1966 is what the majority has

adopted. That opinion seriously erodes the doctrine of separation of powers as between the Executive and the Judiciary. Moreover, much of its language is in the nature of overreach and, as such, adds confusion and unrest to the already troubled area of school desegregation. The overtones of compulsory integration and school racial balances in the original opinion can only chill the efforts of school administrators to complete the task of eliminating dual school systems of the South. In addition, the other side of some of the more important holdings of the majority opinion should be considered and those propositions stated which militate against their validity.

The plain intent of the two opinions is to establish a uniform law for the school systems of this circuit. Thus, the opinions must be tested as laws. Their validity and efficacy as laws should be considered in the frame of reference of need, fairness, clarity and what is constitutionally permissible.

It is fundamental in law making that laws should be fair as between people and sections. The requirement that laws be clear in meaning is also a fundamental. We cannot be expected to obey the law if we cannot understand it. Caligula kept the meaning of the laws from the Romans by posting them in narrow places and in small print[1]—it is no different today when the law is couched in vagueness.

[1] Suetonius, The Lives of the Twelve Caesars, (Random House, 1959), p. 191, 192.

Then there is the matter of personal liberty. Under our system of government, it is not to be restricted except where necessary, in balance, to give others their liberty, and to attain order so that all may enjoy liberty. History records that sumptuary laws have been largely unobserved because they failed to recognize or were needlessly restrictive of personal liberty. Our experiments with sumptuary-like laws are exemplified by the *Dred Scott* decision, 19 How. 393, Reconstruction, and the prohibition laws. All failed.

The majority opinions, considered together, fail to meet the tests of fairness and clarity. The advance approval given to a requirement of compelled integration exceeds what is constitutionally permissible under the Fourteenth Amendment. They cast a long shadow over personal liberty as it embraces freedom of association and a free society. They do little for the cause of education.

It is important, however, that this dissenting opinion not mislead any person having responsibility in the area of school desegregation. The dual system of education must be eliminated. This was ordered in 1955. *Brown v. Board of Education of Topeka,* 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083. School boards were told to convert the dual segregated school systems into racially nondiscriminatory school systems. The court pointed to problems that might arise in the transition with respect to the physical condition of school plants, transportation, personnel, and in the revision of school districts and

attendance areas into compact areas. This order followed reargument of the question of remedy after the 1954 decision holding segregated education under the separate but equal doctrine unlawful. *Brown v. Board of Education,* 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. After full argument, the transition was ordered. The separate but equal doctrine was already lost and the time for remedy was at hand. Transition was the remedy provided.

Transition to date has in the main consisted of following a freedom of choice plan for pupil assignment. But freedom of choice without faculty desegregation and the elimination of discrimination in buildings, equipment, services and curriculum will not suffice to convert a dual system into a unitary nondiscriminatory system. The slow progress to date toward eliminating dual systems is what has brought about the majority opinions, and is also at the root of the disturbance between the Health, Education, and Welfare Department and many school boards. The objective must be, as the Department of Justice contends, that there be no white schools—no Negro schools—just schools. But this is all that is required and it can be accomplished without the open-end compulsory integration language of the majority opinions, or the geometric progression guidelines[2] of HEW which the majority opinion approves.

[2] Even while these cases were pending after en banc argument, HEW announced new guidelines. Now for a school system to receive approval without further investigation, it must show that the number of minority group students in integrated schools within the system in the school

The mandate of the Supreme Court in *Brown II* can be carried out by the assignment of faculty and students without regard to race, and by affording equality in educational opportunity from the standpoint of buildings, equipment, and curriculum. Where freedom of choice in student assignment is ineffective to the extent that a dual system continues, it can be implemented by a neighborhood assignment plan. Assignments should then be made by the school board to the school nearest the home of the student, whether formerly white or Negro. Then the child would be given the option under a freedom of choice plan of attending another school with priority to attend being based on proximity of residence to school. This method of student assignment is comparable to what is being used in Charlotte. *Cf. Swann v. Charlotte-Mecklenburg Board of Education,* 4 Cir., 1966, 369 F.2d 29 (En banc).

We should order the school boards in these cases, which they and the entire court agree must be reversed, to forthwith complete the conversion from dual to unitary systems by the use of these minimum but mandatory directions. School boards and the public would understand the objective—to convert dual school systems into unitary nondiscriminatory systems just as the Supreme Court directed twelve years ago. School boards and the public would also understand the method to be followed in the conversion. But this approach is too simple for the majority. Their view is that something

year 1967-68 will be double the number present in 1966-67 and in some instances triple the number. New Orleans Times-Picayune, March 16, 1967, page 1, Column 4, Associated Press.

more is required—a result which brings about substantial integration of students. The mandatory assignment of students based on race is the method selected to achieve this result. This is a new and drastic doctrine. It is a new dimension in constitutional law and in race relations. It is new fuel in a field where the old fire has not been brought under control.

PROCEDURAL DUE PROCESS AND THE APPROVAL OF THE GUIDELINES

The scope of the majority holding as to the binding force on the federal courts of the HEW guidelines in the area of school desegregation posed a serious separation of powers question. That fact alone should have indicated that the validity of the HEW guidelines was of primary concern. One of the major premises of the original or panel opinion is that HEW excuses those school systems which are under court order from compliance with its guidelines; hence, the necessity of the court setting the guidelines as minimum standards to prevent the courts from being used as an escape route. The original HEW Regulation promulgated in 1964 makes this possible. Title 45A, CFR, § 80.4(c). The HEW statement of policy of 1965, Title 45, CFR, § 181.4, receded from this position but the latest HEW policy supersedes the 1965 statement which includes § 181.4, *supra*. See HEW March and December 1966 Statements—not reported in CFR.

The HEW Statements of Policies for School Desegregation are referred to generally in the school de-

segregation world as guidelines. At least three such statements have been issued; one in 1965, one in March 1966, and another in December 1966. There apparently have been amendments. Footnote 2, *supra.* No guidelines whatever were in issue in the lower courts.[3] The guidelines of March 1966 had not been promulgated when the cases were there. Indeed the guidelines of December 1966 had not been promulgated when the cases were submitted after argument to the original panel of this court. The fact that they had not been in issue did not deter the court in the original opinion. There it was held that the ". . . HEW guidelines now in effect are constitutional and are within the statutory authority created in the Civil Rights Act of 1964" This perhaps meant all guidelines promulgated up to the date of the opinion, December 29, 1966. Any doubt as to the inclusion of the December 1966 guidelines was resolved when the majority in the en banc per curiam opinion stated that the 1965 and 1966 HEW guidelines are within the decisions of this court and comply with the letter and spirit of the Civil Rights Act of 1964 and meet the requirements of the United States Constitution. This is adjudication without any semblance of due process of law. It is an unprecedented procedure and a shocking

[3] The practice of hearing appeals in school cases on old records is very unsatisfactory. We do not know what changes in desegregation plans may have been made in the interim. It is a rapidly changing public area where plans as well as the law are in flux. Cf. *Calhoun v. Latimer,* 1964, 377 U.S. 263, 84 S.Ct. 1235, 12 L.Ed.2d 288, where the court took note of a supervening plan and remanded for an evidentiary hearing in the District Court.

departure from even rudimentary due process.[4] Approval of future guidelines is limited by the majority to those ". . . within lawful limits."

The theory of the court escape route and the necessity to hold all guidelines valid is apparently developed in the interest of supporting the national policy, as expressed in the Civil Rights Act of 1964, of eliminating discrimination in public education. The general theme of the majority is that HEW has the carrot in the form of federal funds but no stick. A stick is needed in those situations where a school board may not take federal funds. The aim is to make a stick out of the federal courts. The courts should cooperate with HEW but they cannot be made to play the part of any stick that HEW may formulate and this is the tenor of the original opinion. Courts are restricted to acting within the limits of the Fourteenth Amendment in the school desegregation area. It may or may not be proper for a court to act within the limits of what the HEW policy may be in allocating federal school funds. Sometimes there may be a difference. A decent respect for the judiciary dictates that we make this plain.

[4] Section 602 of Title IV of the Civil Rights Act of 1964, 42 USCA, § 2000d-1 provides that no rule, regulation or order of HEW shall become effective unless and until approved by the President. Whether the guidelines are such rules or regulations cannot be decided without an evidentiary hearing concerning their meaning through application. This question has never been put in issue in these cases.

THE STANDARD REQUIRED BY THE MAJORITY IS UNCONSTITUTIONALLY VAGUE

The original opinion states in two places that the only satisfactory plan for desegregating a school system is one that works. One looks in vain for a definition of "one that works". This is manifestly a vague standard. It cannot be followed. Moreover, it is subject to selective enforcement and a statute couched in such language would be patently unconstitutional.

In another place in the original opinion the statement is made that substantial integration must be achieved in disestablishing dual school systems. This is not clear. What is substantial? Is the reference simply to a system, or to each school, or to each class room?

The en banc per curiam opinion may have attempted to improve the standard by saying that the criterion for determining the validity of a provision in a school desegregation plan is whether the provision is reasonably related to accomplishing the objective of educational opportunities on equal terms to all. Who knows the meaning of this? There is no mention of result.

These vague standards are perhaps the most mischievous parts of the majority opinions. They place unfettered discretion in HEW in the area of school desegregation. No school board will ever know when it has performed its duty to eliminate the dual school system. No school board will ever know whether federal funds will be made available. This type of standard

places school systems under men and not laws. School boards and school patrons are entitled to a clear and definite standard. The problem of desegregation will not be solved absent a clear standard.

THE DE JURE-DE FACTO DOCTRINE IS INFAIR

The unfairness which inheres in the majority opinion stems from the new doctrine which the original panel fashioned under the concept of classifying segregation into two types: de jure segregation, called apartheid, for the seventeen southern and border states formerly having legal segregation; and de facto segregation for the other states of the nation. This distinction, which must be without a difference and somewhat hollow to a deprived child wherever located, is used as a beginning. The original opinion then goes on to require affirmative action on the part of the school authorities in the de jure systems to integrate the schools. The neighborhood school systems of the nation with their de facto segregation are excused. The Constitution does not reach them.[5]

This reasoning is necessary to reach the end of compulsory integration in the so-called de jure states. It is the counterpart to overruling the settled construction of the Fourteenth Amendment, to be next discussed, that integration is not commanded. The restrictions in the Civil Rights Act of 1964 against requiring school racial balances by assignment and transportation are written

[5] The legislative history of the Civil Rights Act of 1964 does not show that Congress acted on a de jure-de facto basis. I would not attribute such a form of sectionalism to the Congress.

out of the law with respect to the de jure states by using the de jure-de facto theory. Title IV, §§ 401(b), 407(a), 42 USCA, §§ 2000c(b), 2000c-6. The overruling of the constitutional limitation removes the other impediment to compulsory integration. The way is thus cleared for the new dimension. The only question left is when, and to what extent. The authority to HEW is carte blanche. We should disavow the de jure-de facto doctrine as being itself violative of the equal protection clause. It treats school systems differently. It treats children differently. It is reverse apartheid. It poses the question whether legally compelled integration is to be substituted for legally compelled segregation. It is unthinkable that our Constitution does not contemplate a middle ground—no compulsion one way or the other.

The de jure-de facto doctrine simply is without basis. Segregation by law was legal until the *Brown* decision in 1954. Such segregation should hardly give rise to punitive treatment of those states employing what was then a legal system. The Supreme Court has never so indicated. Moreover, the Supreme Court holding in *Brown* was based on the finding that segregated education was unequal. How can it be unequal in one section of the country and not another? Does *Brown* interdict only segregation imposed affirmatively by law, or does its rationale also include the state action of holding to neighborhood assignments thereby perpetuating de facto segregation? The majority decision limits the rationale to the southern and border states type of segregation formerly imposed affirmatively by law. In such event compelled integration may be required in the de jure

states but the logic of reaching this point, because of the restrictions in the 1964 Act to the contrary, excuses the de facto states from the Act and the Constitution.

The real answer is that no such new doctrine or theory is necessary. The schools of the South and border states must do what the Supreme Court has ordered—convert dual school systems into unitary nondiscriminatory school systems. The constitutional power already exists in the courts to see that this is done. This newly discovered source of power tends only to disturb settled doctrine. Its purpose can only be to require racial balances in the de jure states.

THE BRIGGS DICTUM

It is a settled constitutional principle that the Fourteenth Amendment does not require compulsory integration but only proscribes segregation. It is the state action segregation which violates the equal protection clause. We have so stated in the following cases: *Avery v. Wichita Falls Independent School District*, 1956, 241 F.2d 230; *Borders v. Rippy*, 1957, 247 F.2d 268; *Rippy v. Borders*, 1957, 257 F.2d 73; *Cohen v. Public Housing Administration*, 1958, 257 F.2d 73; *City of Montgomery v. Gilmore*, 1960, 277 F.2d 364; *Boson v. Rippy*, 1960, 285 F.2d 43; *Stell v. Savannah-Chatham County Board of Education*, 1964, 333 F.2d 55; *Evers v. Jackson*, 1964, 328 F.2d 408; *Lockett v. Board of Education of Muscogee County*, 1965, 342 F.2d 225.

This principle is euphoneously referred to in the original two-judge opinion as the *Briggs* dictum. It was stated in *Briggs v. Elliott,* E.D.S.C., 1955, 132 F. Supp. 776, but no court, until now, has ever held the Fourteenth Amendment to mean otherwise. The Amendment is entirely negative in character. The original panel, as a part of its two-pronged approach to compulsory integration, overruled this principle *sub silentio.*

The court, sitting en banc, could overrule this settled principle and the majority has now done so to an unknown extent in paragraph 3 of the per curiam opinion. We will not know the extent until the question of racial percentages is squarely presented. Here, as I understand the per curiam opinion, the question is tangential except as it relates to converting to a unitary school system. In the first sentence of paragraph 3 the majority holds that school boards have the affirmative duty under the Fourteenth Amendment to bring about a unitary school system in which there are no Negro or white schools—just schools. We can all agree on this statement. The opinion does away with any distinction between the terms "integration" and "segregation" in the field of school desegregation law insofar as the distinction interferes with the affirmative duty to bring about unitary school systems. We can all agree on this. It is then said that in fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all white schools but that such opportunity must be coupled with the integra-

tion of faculty, facilities, and activities. Then, without more, the decisions of this court setting out this principle are overruled to the extent that they conflict with the view of the majority. I am left in doubt as to whether this is a retrenchment from the panel decision. Time will tell.

It may be added that if the court is overruling this settled constitutional principle, it brings this circuit into conflict with the First, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits. *Springfield v. Barksdale*, 1 Cir., 1965, 348 F.2d 261; *Bradley v. School Board of Richmond, Virginia*, 4 Cir., 1965, 345 F.2d 310; *Swann v. Charlotte-Mecklenburg Board of Education*, 4 Cir., 1966, 369 F.2d 29; *Deal v. Cincinnati Board of Education*, 6 Cir., 1966, 369 F.2d 55; *Bell v. School, City of Gary, Indiana*, 7 Cir., 1963, 324 F.2d 209, cert. den., 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216; *Clark v. Board of Education of Little Rock*, 8 Cir., 1966, 366 F.2d 661; and *Downs v. Board of Education of Kansas City*, 10 Cir., 1964, 336 F.2d 988, cert. den., 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800. The case of *Taylor v. Board of Education of New Rochelle*, 2 Cir., 1961, 294 F.2d 35 is not to the contrary. There the remedy fashioned was freedom of choice imposed on neighborhood assignments. The case of *Board of Education of Oklahoma City v. Dowell*, 10 Cir., 1967, ... F. 2d ...., [slip opinion dated January 23, 1967], does not appear to be to the contrary. The court distinguished *Downs* by pointing out that *Dowell* involved a finding of bad faith on the part of the school board in carrying out the original order of the District Court to disestablish the dual school system.

It is hard to know just what the court has held as between the panel decision and the en banc per curiam decision. The labored effort to establish the de jure-de facto concept and to overrule this constitutional principle hardly seems calculated as an exercise in semantics. It is more in the nature of judicial lagniappe for use on another day. We will know the full import of the opinions when a motion is presented to assign children on the basis of race so as to comply with what each particular movant may deem to be, in his view, a desirable racial composition for the particular school or schools. This leaves the law in a very unsatisfactory state and portends of utter confusion for school boards.[6]

[6] A good example of the problems to be encountered in eliminating the dual school system is to be seen in the Taliaferro County, Georgia school system. See *Turner v. Goolsby,* S.D. Ga., 1965, 255 F.Supp. 724, for background. There were only two schools in the system and the board desegregated, effective in September 1966, on the basis of converting the white school into an elementary school and the Negro school into a high school. A perfect racial balance would be accomplished under the plan. In 1965 there were approximately 600 Negro children and 200 white children enrolled in the system. The records of the Georgia State Department of Education as of January 19, 1967 indicate that there are now 527 Negro students enrolled in the Taliaferro County school system and no white students. This result raises serious questions. How is a "plan that works" to be formulated for this school system? What number of white students will be needed to make it work? Where will they come from? How will they be selected? Will a lottery system be used? Will they be compelled to attend the Taliaferro County school system? If so, how? Will the taxpayers of the system be compelled to pay for educating children brought in from outside the system? Will the court ignore system lines although the laws of Georgia provide for separate school systems? What measures will be employed to avoid resegregation through families removing their residences from the school system? Granted this is an extreme example but it is nevertheless a factual situation.

THE DECREE

The use of a uniform decree, as the majority points out, is not novel. Our school desegregation decisions have tended toward uniformity in the freedom of choice method of assignment and in the administration of such plans. A uniform decree within the limits of minimum standards would aid school boards and the district courts but the uniform decree entered in this case can be faulted because of its detail. This comes about through the unbounded aim of the court to track the HEW guidelines. It must be remembered that decrees may have to be enforced by the court and a court should guard against being put in the unfeasible position of having to hear motions based on the alleged breach of some minor and insubstantial provision of its decree. It is also not clear to me that sufficient latitude is left to the district courts to adjust such practical difficulties as may arise under the detail of the decree.

HEW has an advantage over the district courts, as the court has now restricted them, in the execution of school desegregation plans. HEW may delay, excuse, and change. HEW may vary its requirements as between systems. The majority has left no such power in the district courts. They are admonished to follow HEW but it is a sad day for the district courts, and for the entire judiciary as well as for the principle of separation of powers when the only discretion left them is within the limits to be set by HEW.

It also would appear improper to constitute the courts as overlords of the school systems of this circuit to the extent done in the uniform decree. The district courts must require school equalization to the extent set out in paragraph VI of the decree. Its scope is only a short step from taking over curriculum. The building improvement provision moves the courts in the direction of levying local taxes. Ordering school boards to discontinue the use of buildings could amount to taking property without due process and just compensation. These are drastic measures and there are no facts before the court to demonstrate the necessity for them. It is entirely proper for the District Court to disapprove new construction where it will perpetuate the dual school system but this is a matter for complaint and hearing rather than for advance supervision as is required under § VII of the decree.

By way of summation, I reiterate that the majority opinions are unfair to the extent that they discover or establish and then rely upon the de jure-de facto divisive sectional theory. The opinions expand, without constitutional authority, the requirement that dual school systems be converted into something more than unitary school systems: to-wit, that substantial integration be achieved in the respective school systems. This added requirement is itself impermissibly vague as a standard without further delineation. The opinions unduly restrict personal liberty to the extent that compelled integration is approved or re-

quired, and in this regard improperly overturn and expand the settled meaning of the Fourteenth Amendment. The court errs in prematurely holding that the guidelines issued by HEW are constitutional and within the scope of the Civil Rights Act of 1964. No guidelines whatever were considered by the district courts. Some of those approved had not been written.

My own view is that the law makes no such requirement as the majority of the court imposes. No such radical departure is necessary to accomplish what the Supreme Court has directed the lower courts to accomplish—the elimination of the dual school system. The Supreme Court has not said that every school must have children from each race in its student body, or that every school room must contain children from each race, or that there must be a racial balance or a near racial balance, or that there be assignments of children based on race to accomplish a result of substantial integration. The Constitution does not require such. We would do well to "stick to our last" so as to carry out the Supreme Court's present direction. It is no time for new notions of what a free society embraces. Integration is not an end in itself; a fair chance to attain personal dignity through equal educational opportunity is the goal. My view, however, is now lost in this court; hence this DISSENT.

COLEMAN, Circuit Judge. SEPARATE OPINION.

These cases remind me of what Mr. Chief Justice Chase said in *Texas v. White*:[1]

> "We are very sensible of the magnitude and importance of this question, of the interest it excites, and of the difficulty, not to say impossibility, of so disposing of it as to satisfy the conflicting judgments of men equally enlightened, equally upright, and equally patriotic. But we meet it in the case, and we must determine it in the exercise of our best judgment, under the guidance of the Constitution alone."

This Court, exercising only such appellate jurisdiction as Congress has seen fit to confer upon it, confronted solely by a question of how best to preserve an already settled Constitutional right, should be guided *by the Constitution alone and by nothing else.*

No one denies that to an incalculable degree the future of this Country depends inescapably upon the continued, constantly improved education of *all its inhabitants.* Nor can it very successfully be denied that the best practical hope of attaining this objective is to be found and maintained in the public schools. It became plain over a hundred years ago that private schools did not and could not reach the masses of the people.

Compulsory discrimination in the public schools, founded on race or color, is Constitutionally dead. No

[1] 74 U.S. 700,720; 7 Wall 700; 19 L. Ed. 227 (1868).

Judge would dispute this. Existentially it is like the wounded animal which bounds on for awhile after it has been fatally shot. The critical problem now is that we must not wreak irreparable injury upon public schools while executing the sentence of death against compulsory segregation. Thoroughly realizing this, the Supreme Court left the details of the eradication to the sound judicial discretion of the District Courts, subject only to appellate review. To this day this assignment has not been changed. I do not suppose in our form of government that it could be changed. Courts alone make binding adjudications on questions of Constitutionality, and litigation must begin at the District level.

The public schools of the Nation, not just those of a particular section, are now caught up at the second battleground, legal and political, not about the death of unlawful discrimination but about who and how many of any particular race shall go to any particular school with how many members of some other race. If one looked only at the great volume of litigation and its accompanying strife and publicity he would jump to the conclusion that nothing matters but the racial composition of any educational facility. This is pursued regardless of the real preferences, exercised, in genuine freedom, of those directly involved, that is, those who must have an education. In the ultimate this could become a great tragedy for those most affected. An educational house divided against itself may have trouble standing. It certainly cannot operate with maximum effectiveness.

In the light of these considerations, as one who was able to secure an education solely because there was a public school in which there was an opportunity to obtain it, I shall now express my views, as one Judge of this Court, individually, as to the decision now about to be rendered.

In doing so, I proceed upon the thesis that there is nothing at all inconsistent about being, at the same time, both a loyal American and a Southerner. I think Andrew Jackson conclusively settled that point over a century ago.

It is particularly unfortunate if our decision in these cases is in any way to be grounded on old scores against the States of this Circuit. This is contrary to American legal tradition; it opens old wounds, rekindles old fires, and lends itself as a weapon to the futile cause of further intransigency. Prior to 1954, racially separate, if equal, schools had not been condemned as unconstitutional. One is not to be punished or harassed for an act which was lawful when it was done. Indeed, such condemnation in this instance would inferentially include some of the most highly respected Judges who ever graced the Supreme Court. They had opportunities to condemn the system but, in the exercise of perfect judicial integrity, did not. As I understand it, an Omnipotent God does not change yesterday when it is past and gone. Certainly this Court cannot do it. We are now concerned with rectifying the errors of the present and forestalling, if we can, the anticipated errors of the future. I decline to participate in any ex post facto condemnations. I pre-

fer to believe that this Court is not deliberately doing so.

I further believe that whatever the Fourteenth Amendment requires of any State it requires of all States. If we are requiring something here in the enforcement of Fourteenth Amendment rights that should not be required of all fifty States then we have exceeded our authority and we have misapplied the Constitution. I agree with the action of the majority opinion in disclaiming any intention of passing on the validity of educational operations in other Circuits. That matter is not and cannot be before us.

It is out of regard for the desirability of Constitutional uniformity that I agree, in principle, with the attempt to formulate a decree for the future guidance of District Courts in this Circuit. It is obvious that such a decree cannot adjudicate cases in advance of a hearing in the District Court, nor can it be applied in the absence of factual justification.

The decree speaks for itself, of course, but I interpret it to deal at this point with making freedom of choice a reality instead of a promise. I do not understand that this Court has abandoned freedom of choice, if that choice is real instead of illusory.

Nor do I understand it to direct that there shall be a specified percentage of the various races in any particular public school or that there shall be proportional representation of the races brought about by

arbitrary order. I agree with Judges Gewin and Bell that the opinion strongly portends such a possibility. But paragraph 5 of the en banc opinion certainly disclaims any such intention. The District Courts are left free to consider all the evidence, including racial attendance percentages, in determining whether the children of any particular school district have been offered a reality instead of a shadow. It is to be anticipated that the bridge will later have to be crossed when we come face to face with a situation wherein there can be no doubt of the freedom but the results are displeasing and are attacked solely for that reason.

I think it all boils down to this. We once had the doctrine of separate but equal. We did not, I am sorry to say, pay much attention to the "equal". We now have freedom of choice. As Judge Bell so splendidly states it, we are now going to have to make certain of the "freedom". To fail in this is to invite other action which at this time I regard as unconstitutional but which could soon be made Constitutional.

The decree is not as I would have written it had I been charged with sole responsibility for the effort. No offense is intended when I doubt that it is perfect. For example, the *en banc* opinion says that "boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system". Yet II (o) of the decree prohibits any official from influencing parents or students in

the exercise of a choice. In other words, if the officials feel that Negro children should be encouraged to apply for admission to a formerly white school they are prohibited from doing so. They are to be condemned, on appearances, if no Negro child chooses to attend a formerly white school; they are not allowed, in the exercise of ordinary freedom of speech, to discuss the matter with Negro children with a view to their exercising a preference in favor of attending a school they have not formerly attended. The school official cannot win. In one breath he is told to act; in the next he is immobilized.

Experience will hone away these inconsistencies and impossibilities. This Court has drafted uniform decrees on prior occasions. These are now speedily outmoded, if not abandoned. Judges, like other human beings, do not always write in granite; they often find that they have only marked in the sand.

Since the HEW guidelines were not the subject of a hearing in the Courts below I do not discuss them here. In my view, they are not now before this Court.

The focal point of the whole matter is the action of the *en banc* opinion repudiating *Briggs v. Elliott* and over-ruling our prior opinions which followed the same rationale, see Footnotes 1 and 2 for the citations.

It is my view that these prior cases were correctly decided. Other Circuit Courts in this Country appear

to feel likewise. If the reasoning in these over-ruled cases is incorrect then we simply face the following:

The freedom of the Negro child to attend any public school without regard to his race or color, first secured in the *Brown* cases, is again lost to him after a short life of less than thirteen years. He is left open to a future adjudication that although he does not wish to attend School A and has in fact expressed a desire to go elsewhere this is of no importance. Because of his race he can be assigned to a particular school to achieve a result satisfactory to someone who probably does not even live in the district but who wishes to make a racial point. Thus the child reenters the same racial discrimination from which he escaped so short a time ago. He remains bogged in race. Moreover, when Negro children are to be selected by someone, we know not who, to comply with such a racial assignment, on what basis will the selection be made? How will the wishes of some be respected and others rejected, solely because they happen to be of the Negro race? We are not freeing these children of racial chains. We are compounding and prolonging the difficulty.

The true answer remains, give him absolute freedom of choice and see to it that he gets that choice in absolute good faith.

In conclusion, I wish to say that in my own case a burning desire to obtain an education in the face of impossible circumstances is not a theoretical experience encountered only by others. I did not have an

opportunity to attend school until I was eight years of age. The delay was quite unavoidable; there simply was no school to attend at that particular time. My mother taught me how to read and write, to add and subtract. My total sympathies are with the cause of education freely available to all. This, of course, under the Constitution requires no special privileges for any group or segment of the population. I regret that where once the concern was for schools to attend we now have so much strife about the details of utilizing those so readily available.

What I have said herein is with the greatest deference for my Brethren who think otherwise. We must and shall continue to work together according to our individual judgments of the law. The en banc decision may portend more problems ahead than we have heretofore encountered.

I concur in the reversal of the Judgments below, but my views of the issues generally are as herein set forth.

GODBOLD, Circuit Judge, dissenting:

I respectfully dissent. I wish not to delay appellate procedures if any of the parties desire to pursue them. Therefore, I am recording my dissent at this time and will file a dissenting opinion at a later date.

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CORRECTED COPY

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23345

UNITED STATES OF AMERICA and LINDA STOUT, by her father and next friend, BLEVIN STOUT,

Appellants,

versus

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL,

Appellees.

No. 23331

UNITED STATES OF AMERICA,

Appellant,

versus

THE BOARD OF EDUCATION OF THE CITY OF FAIRFIELD, ET AL,

Appellees.

No. 23335

UNITED STATES OF AMERICA,
Appellant,

versus

THE BOARD OF EDUCATION OF THE CITY OF BESSEMER, ET AL,
Appellees.

Appeals from the United States District Court for the Northern District of Alabama.

No. 23274

UNITED STATES OF AMERICA,
Appellant,

versus

CADDO PARISH SCHOOL BOARD, ET AL,
Appellees.

No. 23365

UNITED STATES OF AMERICA,
Appellant,

versus

THE BOSSIER PARISH SCHOOL BOARD, ET AL,
Appellees.

No. 23173

MARGARET M. JOHNSON, ET AL,
Appellants,

versus

JACKSON PARISH SCHOOL BOARD, ET AL,
Appellees.

No. 23192

YVORNIA DECAROL BANKS, ET AL,
Appellants,

versus

CLAIBORNE PARISH SCHOOL BOARD, ET AL,
Appellees.

Appeals from the United States District Court for the Western District of Louisiana.

(December 29, 1966.)

Before WISDOM and THORNBERRY, Circuit Judges, and COX,* District Judge.

WISDOM, Circuit Judge: Once again the Court is called upon to review school desegregation plans to determine whether the plans meet constitutional standards. The distinctive feature of these cases, consolidated on appeal, is that they require us to reexamine school desegregation standards in the light of

* William Harold Cox, U. S. District Judge for the Southern District of Mississippi, sitting by designation.

the Civil Rights Act of 1964 and the Guidelines of the United States Office of Education, Department of Health, Education, and Welfare (HEW).

When the United States Supreme Court in 1954 decided *Brown v. Board of Education*[1] the members of the High School Class of 1966 had not entered the first grade. *Brown I* held that separate schools for Negro children were "inherently unequal".[2] Negro children, said the Court, have the "personal and present" right to equal educational opportunities with white children in a racially nondiscriminatory public school system. For all but a handful of Negro members of the High School Class of '66 this right has been "of such stuff as dreams are made on".[3]

"The *Brown* case is misread and misapplied when it is construed simply to confer upon Negro pupils the right to be considered for admission to a white

[1] Brown v. Board of Education, 1954, 347 U. S. 483, 74 S.Ct. 686, 98 L. Ed. 873 (*Brown I*). See Brown v. Board of Education, 1955, 349 U.S. 294, 75 S.Ct. 293, 99 L.Ed. 1083 (*Brown II*).

[2] 347 U. S. at 495.

[3] Shakespeare, The Temptest IV. The cases consolidated for appeal involve Alabama and Louisiana public schools. In Alabama, as of December 1965, there were 1250 Negro pupils, out of a statewide total of 295,848, actually enrolled in schools with 559,123 white students, 0.43% of the eligible Negro enrollment. In Louisiana there were 2187 Negro children, out of a total of 318,651, enrolled in school with 483,941 white children, 0.69% of the total eligible. Southern Education Reporting Service, Statistical Summary of Segregation-Desegregation in the Southern and Border Area from 1954 to the present, 15th Rev. p. 2, Dec. 1965. See Appendix B, Rate of Change and Status of Desegregation. In each of the seven cases before this Court, no start was made toward desegregation of the schools until 1965, eleven years after *Brown*. In all these cases, the start was a consequence of a court order obtained only after vigorous opposition by school officials.

school".[4] The United States Constitution, as construed in *Brown*, requires public school systems to integrate students, faculties, facilities, and activities.[5] If *Brown*

[4] Braxton v. Board of Public Instruction of Duval County, S.D.Fla. 1962, 7 Race Rel. L. Rep. 675, *aff'd,* 5 Cir. 1964, 326 F.2d 616, *cert. den'd* 377 U. S. 924 (1964). Senator Humphrey cited this case in explaining Section 604 of The Civil Rights Act of 1964. See Section IV D of this opinion.

[5] The mystique that has developed over the supposed difference between "desegregation" and "integration" originated in Briggs v. Elliott, E.D.S.C. 1955, 132 F.Supp. 776: "The Constitution . . . does not require integration. It merely forbids segregation". 132 F.Supp. at 777. This dictum is a product of the narrow view that Fourteenth Amendment rights are only individual rights; that therefore Negro school children individually must exhaust their administrative remedies and will not be allowed to bring class action suits to desegregate a school system. See Section IIIA of this opinion.

The Supreme Court did not use either "desegregation" or "integration" in *Brown*. But the Court did quote with approval a statement of the district court in which "integrated" was used as we use it here. For ten years after *Brown* the Court carefully refrained from using "integration" or "integrated". Then in 1964 in Griffin v. County School Board of Prince Edward County, 375 U.S. 391, 84 S.Ct. 400, 11 L.Ed.2d 409, the Court noted that "the Board of Supervisors decided not to levy taxes or appropriate funds for *integrated* public schools", i.e. schools under a desegregation order. There is not one Supreme Court decision which can be fairly construed to show that the Court distinguished "desegregation" from "integration", in terms or by even the most gossamer implication.

Counsel for the Alabama defendants assert that "desegregation" and "integration" are terms of art. They struggle valiantly to define these words:

> By "desegregation" we mean the duty imposed by *Brown* upon schools which previously compelled segregation to take affirmative steps to eliminate such *compulsory segregation* so as to *allow* the *admission* of students to schools on a non-racial admission basis. By "integration" we mean the actual placing of or attendance by Negro students in schools with whites.

They can do so only by narrowing the definitions to the point of inadequacy. Manifestly, the duty to desegregate schools extends beyond the mere "admission" of Negro students on a non-racial basis. As for "integration", manifestly a desegregation plan must include some arrangement for the attendance of Negroes in formerly white schools.

In this opinion we use the words "integration" and "desegregation" interchangeably. That is the way they are used in the vernacular. That is the way they are defined in Webster's Third New International Dictionary: " 'integrate' to 'desegregate' ".

I left any doubt as to the affirmative duty of states to furnish a fully integrated education to Negroes as

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The Civil Rights Commission follows this usage: for example, "The Office of Education . . . standards . . . should . . . ensure that free choice plans are adequate to disestablish dual, racially segregated school systems . . . to achieve substantial integration in such systems." U. S. Comm. Survey of School Desegregation 1965-66, p. 54.

The Eighth Circuit used "integration" interchangeably with "desegregation" in Smith v. Board of Education of Morrilton, 8 Cir. 1966, 365 F.2d 770. So did the Third Circuit in Evans v. Ennis, 3 Cir. 1960, 281 F.2d 385. See also Brown v. County School Board of Frederick County, Va., W.D.Va. 1965, 245 F. Supp. 549. The courts in Dowell v. School Board of Oklahoma City Public Schools, W.D.Okla. 1965, 244 F. Supp. 971 and Dove v. Parham, 8 Cir. 1960, 282 F.2d 256 (and the Civil Rights Commission), speak of a school board's duty to "*disestablish* segregation". This term accurately "implies that existing racial imbalance is a consequence of past segregation policies, and, because of this, school boards *have an affirmative duty to remedy racial imbalance*". Note, Discrimination in the Hiring and Assignment of Teachers in Public School Systems, 64 Mich. L. Rev. 692, 698 n.44 (1966). (Emphasis added.)

We use the terms "integration" and "desegregation" of formerly segregated public schools to mean the conversion of a de jure segregated dual system to a unitary, nonracial (nondiscriminatory) system—lock, stock, and barrel: students, faculty, staff, facilities, programs, and activities. The proper governmental objective of the conversion is to offer educational opportunities on equal terms to all.

As we see it, the law imposes an absolute duty to desegregate, that is, disestablish segregation. And an absolute duty to integrate, in the sense that a disproportionate concentration of Negroes in certain schools cannot be ignored; racial mixing of students is a high priority educational goal. The law does not require a maximum of racial mixing or striking a racial balance accurately reflecting the racial composition of the community or the school population. It does not require that each and every child shall attend a racially balanced school. This, we take it, is the sense in which the Civil Rights Commission used the phrase "substantial-integration".

As long as school boards understand the objective of desegregation and the necessity for complete disestablishment of segregation by converting the dual system to a nonracial unitary system, the nomenclature is unimportant. The criterion for determining the validity of a provision in a desegregation plan is whether it is reasonably related to the objective. We emphasize, therefore, the governmental objective and the specifics of the conversion process, rather than the imagery evoked by the pejorative "integration". Decision-making in this important area of the law cannot be made to turn upon a quibble devised over

a class, *Brown II* resolved that doubt. A state with a dual attendance system, one for whites and one for Negroes, must "effectuate a transition to a [single] racially nondiscriminatory system."[6] The two *Brown* decisions established equalization of educational opportunities as a high priority goal for all of the states and compelled seventeen states, which by law had segregated public schools, to take affirmative action to reorganize their schools into a unitary, nonracial system.

The only school desegregation plan that meets constitutional standards is one that works. By helping public schools to meet that test, by assisting the courts in their independent evaluation of school desegregation plans, and by accelerating the progress but simplifying the process of desegregation the HEW Guidelines offer new hope to Negro school children long denied their constitutional rights. A national effort, bringing together Congress, the executive, and the judiciary may be able to make meaningful the right of Negro children to equal educational opportunities. The courts acting alone have failed.

We hold, again, in determining whether school desegregation plans meet the standards of *Brown* and

ten years ago by a court that misread *Brown,* misapplied the class action doctrine in the school desegregation cases, and did not foresee the development of the law of equal opportunities.

[6] Brown v. Board of Education, 1955, 349 U.S. 294, 301.

other decisions of the Supreme Court,[7] that courts in this circuit should give "great weight" to HEW Guidelines.[8] Such deference is consistent with the exercise of traditional judicial powers and functions. HEW Guidelines are based on decisions of this and other courts, are formulated to stay within the scope of the Civil Rights Act of 1964, are prepared in detail by experts in education and school administration, and are intended by Congress and the executive to be part of a coordinated national program. The Guidelines present the best system available for uniform application, and the best aid to the courts in evaluating the validity of a school desegregation plan and the progress made under that plan.

HEW regulations provide that schools applying for financial assistance must comply with certain requirements. However, the requirements for elementary or secondary schools "shall be deemed to be satisfied if such school or school system is subject to a final order of a court of the United States for the desegregation of such school or school system . . ."[9] This regulation causes our decisions to have a twofold impact on school desegregation. Our decisions determine not only (1) the standards schools must comply with under *Brown* but also (2) the standards these schools must comply with to qualify for federal financial assistance. Schools automatically qual-

[7] Especially Cooper v. Aaron, 1958, 358 U.S. 1, 78 S.Ct. 1399, 3 L.Ed.2d 3; Bradley v. School Board of the City of Richmond, 1965, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187; Rogers v. Paul, 1965, 382 U.S. 198, 86 S.Ct. 358, 15 L.Ed.2d 265.

[8] Singleton v. Jackson Municipal Separate School District, 5 Cir. 1965, 348 F.2d 729 (*Singleton I*).

[9] 45 C.F.R. §80.4(c) (1964).

ify for federal aid whenever a final court order desegregating the school has been entered in the litigation and the school authorities agree to comply with the order. Because of the second consequence of our decisions and because of our duty to cooperate with Congress and with the executive in enforcing Congressional objectives, strong policy considerations support our holding that the standards of court-supervised desegregation should not be lower than the standards of HEW-supervised desegregation. The Guidelines, of course, cannot bind the courts; we are not abdicating any judicial responsibilities.[10] But we hold that HEW's standards are substantially the same as this Court's standards. They are required by the Constitution and, as we construe them, are within the scope of the Civil Rights Act of 1964. In evaluating desegregation plans, district courts should make few exceptions to the Guidelines and should carefully tailor those so as not to defeat the policies of HEW or the holding of this Court.

Case by case over the last twelve years, courts have increased their understanding of the desegregation process.[11] Less and less have courts accepted the question-begging distinction between "desegregation" and "integration" as a sanctuary for school boards fleeing from their constitutional duty to estab-

[10] In *Singleton I,* to avoid any such inference, we said: "The judiciary has of course functions and duties distinct from those of the executive department . . . Absent legal questions, the United States Office of Education is better qualified. . . ." 348 F. 2d at 731.

[11] "The rule has become: the later the start, the shorter the time allowed for transition." Lockett v. Board of Education of Muscogee County, 5 Cir. 1965, 342 F.2d 225, 228.

lish an integrated, non-racial school system.[12] With the benefit of this experience, the Court has restudied the School Segregation Cases. We have reexamined the nature of the Negro's right to equal educational opportunities and the extent of the correlative affirmative duty of the state to furnish equal educational opportunities. We have taken a close look at the background and objectives of the Civil Rights Act of 1964.[13]

* * *

We approach decision-making here with humility. Many intelligent men of good will who have dedicated their lives to public education are deeply concerned for fear that a doctrinaire approach to desegregating schools may lower educational standards or even destroy public schools in some areas. These educators and school administrators, especially in communities where total segregation has been the way of life from cradle to coffin, may fail to understand all of the legal implications of *Brown*, but they understand the grim realities of the problems that complicate their task.

The Court is aware of the gravity of their problems. (1) Some determined opponents of desegregation would scuttle public education rather than send their children to schools with Negro children. These men

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[12] See Section III A and footnote 5.

[13] The Court asked counsel in these consolidated cases and in five other cases for briefs on the following questions:

(a) To what extent, consistent with judicial prerogatives and obligations, statutory and constitutional, is it permissible and desirable for a federal court (trial or appellate) to give weight to or to rely on H.E.W. guidelines and policies in cases before the court?

(b) If permissible and desirable, what practical means and methods do you suggest that federal courts (trial and appellate) should follow in making H.E.W. guidelines and policies judicially effective?

flee to the suburbs, reinforcing urban neighborhood school patterns. (2) Private schools, aided by state grants, have mushroomed in some states in this circuit.[14] The flight of white children to these new schools and to established private and parochial schools promotes resegregation. (3) Many white teachers prefer not to teach in Negro schools. They are tempted to seek employment at white schools or to retire. (4) Many Negro children, for various reasons, prefer to finish school where they started. (5) The gap between white and Negro scholastic achievements causes all sorts of difficulties. There is no consolation in the fact that the gap depends on the socioeconomic status of Negroes at least as much as it depends on inferior Negro schools.

No court can have a confident solution for a legal problem so closely interwoven with political, social, and moral threads as the problem of establishing fair, workable standards for undoing de jure school segregation in the South. The Civil Rights Act of 1964 and the HEW Guidelines are belated but invaluable helps in arriving at a neutral, principled deci-

[14] Alabama provides tuition grants of $185 a year and Louisiana $360 a year to students attending private schools. "Only Florida and Texas report no obvious cases of private schools formed to avoid desegregation in public schools." Up to the school year 1965-66, Louisiana had "some 11,000 pupils already receiving state tuition grants to attend private schools." This number will be significantly increased as a result of new private schools in Plaquemines Parish. Leeson, Private Schools Continue to Increase in the South, Southern Education Report, November 1966, p. 23. In Louisiana, students attending parochial schools do not receive tuition grants.

sion consistent with the dimensions of the problem, traditional judicial functions, and the United States Constitution. We grasp the nettle.

I.

"No army is stronger than an idea whose time has come."[15] Ten years after *Brown,* came the Civil Rights Act of 1964.[16] Congress decided that the time had come for a sweeping civil rights advance, including national legislation to speed up desegregation of public schools and to put teeth into enforcement of desegregation.[17] Titles IV and VI together

[15] In a press meeting May 19, 1964, to discuss the Civil Rights bill, Senator Everett Dirksen so paraphrased, "On résiste à l'invasion des armées; on ne résiste pas à l'invasion des idées." Victor Hugo, Histoire d'un crime: Conclusion: La Chute, Ch. 10 (1877). Senator Dirksen then said, "Let editors rave at will and let states fulminate at will, but the time has come, and it can't be stopped." Cong. Quarterly Service, Revolution in Civil Rights 63 (1965).

[16] H. R. 7152, Pub. L. 88-352, 78 Stat. 243; approved July 2, 1964.

[17] "[I]n the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious. That need is evidenced, on the one hand, by a growing impatience by the victims of discrimination with its continuance and, on the other hand, by a growing recognition on the part of all of our people of the incompatibility of such discrimination with our ideals and the principles to which this country is dedicated. A number of provisions of the Constitution of the United States clearly supply the means 'to secure these rights,' and H. R. 7152, as amended, resting upon this authority, is designed as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope." House Judiciary Committee Report No. 914, to Accompany H. R. 7152. 2 U.S. Code Congressional and Administrative News, 88th Cong. 2nd Sess. 1964, 2933. "The transition from all-Negro to integrated schools is at best a difficult problem of adjustment for teachers and students alike. . . . We have tried to point out that the progress in school desegregation so well commenced in the period 1954-57 has been grinding to a halt. The trend observed in 1957-59 toward desegregation by court order

constitute the congressional alternative to court-supervised desegregation. These sections of the law mobilize in aid of desegregation the United States Office of Education and the Nation's purse.

A. Title IV authorizes the Office of Education to give technical and financial assistance to local school systems in the process of desegregation.[18] Title VI requires all federal agencies administering any grant-in-aid program to see to it that there is no racial discrimination by any school or other recipient of federal financial aid.[19] School boards cannot, however, by giving up federal aid, avoid the policy that produced this limitation on federal aid to schools: Title IV authorizes the Attorney General to sue, in the name of the United States, to desegregate a public

rather than by voluntary action has continued. It is not healthy nor right in this country to require the local residents of a community to carry the sole burden and face alone the hazards of commencing costly litigation to compel school desegregation. After all, it is the responsibility of the Federal Government to protect constitutional rights. . . ." Additional Views on H. R. 7152 of Hon. William M. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McC. Mathias, Hon. James E. Bromwell." Ibid., 2487.

[18] 78 Stat. 246-99, 42 U.S.C. § 2000c (1964).

[19] 78 Stat. 252-53, 42 U.S.C. § 2000d (1964). Section 601 states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 602 states: "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of Section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . ."

school or school system.[20] More clearly and effectively than either of the other two coordinate branches of Government, Congress speaks as the Voice of the Nation. *The national policy is plain: formerly de jure segregated public school systems based on dual attendance zones must shift to unitary, nonracial systems—with or without federal funds.*

The Chief Executive acted promptly to carry into effect the Chief Legislature's mandate. President Lyndon B. Johnson signed the bill into law July 2, 1964, only a few hours after Congress had finally approved it. In the signing ceremony broadcast to the Nation, the President said: "We believe all men are entitled to the blessings of liberty, yet millions are being deprived of those blessings—not because of their own failures, but because of the color of their skins. . . . [It] cannot continue."[21] At the request of President Johnson, Vice President Hubert H. Humphrey submitted a report to the President "On the Coordination of Civil Rights Activities in the Federal Government" recommending the creation of a Council on Equal Opportunity. The report concludes that "the very breadth of the Federal Government's effort, involving a multiplicity of programs" necessary to carry out the 1964 Act had created a "problem of coordination." The President approved the recommendation that instead of creating a new agency

[20] 78 Stat. 246-49, 42 U.S.C. § 2000c (1964). In addition, Title IX authorizes the Attorney General to intervene in private suits where persons have alleged denial of equal protection of the laws under the 14th Amendment where he certifies that the case is of "general public importance." 78 Stat. 266, Title IX § 902, 42 U.S.C. § 2000 h-2 (1964).

[21] N.Y. Times, July 3, 1964, p. 1.

there be a general coordination of effort.[22] Later, the President noted that the federal departments and agencies had "adopted uniform and consistent regulations implementing Title VI . . . [in] a coordinated program of enforcement." He directed the Attorney General to "coordinate" the various federal programs in the adoption of "consistent and uniform policies, practices and procedures with respect to the enforcement of Title VI. . . ."[23]

In April 1965 Congress for the first time in its history adopted a law providing general federal aid —a billion dollars a year—for elementary and secondary schools.[24] It is a fair assumption that Congress would not have taken this step had Title VI not established the principle that schools receiving federal assistance must meet uniform national standards for desegregation.[25]

To make Title VI effective, the Department of Health, Education, and Welfare (HEW) adopted the regulation, "Non-discrimination in Federally assisted Programs."[26] This regulation directs the Commissioner of Education to approve applications for fi-

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22 Executive Order 11197, Feb. 9, 1965, 30 F.R. 1721.

23 Executive Order No. 11247, Sept. 28, 1965, 30 F. R. 12327.

24 The Elementary and Secondary Education Act of 1965, 79 Stat. 27.

25 "The Elementary and Secondary Education Act of 1965 greatly increased the amount of federal money available for public schools, and did so in accordance with a formula that pumps the lion's share of the money to low-income areas such as the Deep South. Consequently, Title VI of the Civil Rights Act of 1964 has become the main instrument for accelerating and completing the desegregation of Southern public schools." The New Republic, April 9, 1966 (Professor Alexander M. Bickel).

26 45 C.F.R. Part 80, Dec. 4, 1964, 64 F. R. 12539.

nancial assistance to public schools only if the school or school system agrees to comply with a court order, if any, outstanding against it, or submits a desegregation plan satisfactory to the Commissioner.[27]

To make the regulation effective, by assisting the Office of Education in determining whether a school qualifies for federal financial aid and by informing school boards of HEW requirements, HEW formulated certain standards or guidelines. In April 1965, nearly a year after the Act was signed, HEW published its first *Guidelines,* "General Statement of Policies under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools."[28] These *Guidelines* fixed the fall of 1967 as the target date for total desegregation of all grades. In March 1966 HEW issued "*Revised Guidelines*" to correct most of the major flaws revealed in the first year of operation under Title VI.[29]

B. The HEW Guidelines raise the question: To what extent should a court, in determining whether to approve a school desegregation plan, give weight to the HEW Guidelines? We adhere to the answer

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[27] "Every application for Federal financial assistance to carry out a program to which this part applies . . . shall, as a condition to its approval . . ., contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. . . ." 45 C.F.R. § 80.4 (a) (1964).

[28] U. S. Department of Health, Education and Welfare, Office of Education, General Statement of Policies under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools, April, 1965. It is quoted in full in Price v. Denison Independent School District, 5 Cir. 1965, 348 F.2d at 1010.

[29] Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964. March, 1966.

this Court gave in four earlier cases. The HEW Guidelines are "minimum standards", representing for the most part standards the Supreme Court and this Court established *before the Guidelines were promulgated.*[30] Again we hold, "we attach great weight" to the *Guidelines. Singleton v. Jackson Municipal Separate School District,* 5 Cir. 1965, 348 F.2d 729 (*Singleton I*). "We put these standards to work. . . . [Plans] should be modeled after the Commissioner of Education's requirements. . . . [Exceptions to the guidelines should be] confined to those rare cases presenting justiciable, not operational, questions. . . . The applicable standard is essentially the HEW formulae." *Price v. Denison Independent School District,* 5 Cir. 1965, 348 F.2d 1010. "We consider it to be in the best interest of all concerned that School Boards meet the minimum standards of the Office of Education . . . . In certain school districts and in certain respects, HEW standards may be too low to meet the requirements established by the Supreme Court and by this Court . . . . [But we also] consider it important to make clear that . . . we do not abdicate our judicial responsibility for determining whether a school desegregation plan violates federally guaranteed rights." *Singleton v. Jackson Municipal Separate School District,* 5 Cir. 1966, 355 F.2d 815 *(Singleton II).* In *Davis v. Board of School Commissioners of Mobile County,* 5 Cir. 1966, 364 F.2d 896, the most recent school case before this Court, we ap-

[30] In Davis v. Board of School Commissioners of Mobile County, 5 Cir. 1966, 364 F.2d 896, Judge Tuttle, for the Court, noted that "for more than a year, it has been apparent to all concerned that the requirements of Singleton and Denison were the minimum standards to apply."

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proved *Singleton I* and *II* and *Price v. Denison* and ordered certain changes in the school plan in conformity with the HEW Guidelines.

Courts in other circuits are in substantial agreement with this Court. In *Kemp v. Beasley,* 8 Cir. 1965, 352 F. 2d 14, 18-19, the Court said: "The Court agrees that these [HEW] standards must be *heavily relied upon* . . . . [T]he courts should endeavor to model their standards after those promulgated by the executive. They are not bound, however, and when circumstances dictate, the courts may require something more, less or different from the H.E.W. guidelines." (Emphasis added.) Concurring, Judge Larson observed: "However, that 'something different' should rarely, if ever be less than what is contemplated by the H.E.W. standards." 352 F.2d at 23. *Smith v. Board of Education of Morrilton,* 8 Cir. 1966, 365 F.2d 770 reaffirms that the Guidelines "are entitled to serious judicial deference".

Although the Court of Appeals for the Fourth Circuit has not yet considered the effect of the HEW standards, district courts in that circuit have relied on the guidelines. See *Kier v. County School Board of Augusta County,* W.D.Va. 1966, 249 F. Supp. 239; *Wright v. County School Board of Greenville County,* E.D.Va. 1966, 252 F. Supp. 378; *Miller v. Clarendon County School District No. 2,* D.S.C., Civil Action No. 8752, April 21, 1966. In *Miller,* one of the most recent of these cases, the court said:

> The orderly progress of desegregation is best served if school systems desegregating

under court order are required to meet the minimum standards promulgated for systems that desegregate voluntarily. Without directing absolute adherence to the "Revised Standards" guidelines at this juncture, this court will welcome their inclusion in any new, amended, or substitute plan which may be adopted and submitted.

In this circuit, the school problem arises from state action. This Court has not had to deal with nonracially motivated de facto segregation, that is, racial imbalance resulting fortuitously in a school system based on a single neighborhood school serving all white and Negro children in a certain attendance area or neighborhood. For this circuit, the HEW Guidelines offer, for the first time, the prospect that the transition from a de jure segregated dual system to a unitary integrated system may be carried out effectively, promptly, and in an orderly manner. See Appendix B, Rate of Change and Status of Desegregation.

II.

We read Title VI as a congressional mandate for change—change in pace and method of enforcing desegregation. The 1964 Act does not disavow court-supervised desegregation. On the contrary, Congress recognized that to the courts belongs the last word in any case or controversy.[31] But Congress was dis-

[31] Title IV, § 407, 42 U.S.C. § 2000 (c) authorizing the Attorney General to bring suit, on receipt of a written complaint, would seem to imply this conclusion. Section 409 preserves the right of individual citizens "to sue for or obtain relief" against discrimination in public education. HEW Regulations provide: "In any case in which a final order of a court of the United States for

satisfied with the slow progress inherent in the judicial adversary process.[32] Congress therefore fashioned a new method of enforcement to be administered not on a case by case basis as in the courts but, generally, by federal agencies operating on a national scale and having a special competence in their respective fields. Congress looked to these agencies to shoulder the additional enforcement burdens resulting from the shift to high gear in school desegregation.

A. Congress was well aware that it was time for a change. In the decade following *Brown,* court-supervised desegregation made qualitative progress: Responsible Southern leaders accepted desegregation as a settled constitutional principle.[33] Quantitively,

the desegregation of such school or school system is entered after submission of such a plan, such a plan shall be revised to conform to such final order, including any future modification of such order." 45 C.F.R. § 80.4(c) (1964).

[32] See footnote 17.

[33] "The Federal courts have been responsible for great qualitative advances in civil rights; the lack has been in quantitative implementation—in enabling the individual to avail himself of these great decisions." Bernhard and Natalie, Between Rights and Remedies, 53 Georgetown L. Jour. 915, 916 (1965). "[I]t is the consensus of the judges on the firing line, so to speak, that one phase in the administration of the law—the establishment phase, characterized by permissive tokenism, by a sort of minimal judicial holding of the line while the political process did, as it must, the main job of establishing—this phase has been closed out." Bickel, The Decade of School Desegregation, 64 Colum. L. Rev. 193, 209 (1964). The changes of the past decade have disappointed the most optimistic hopes, but they have been dramatically sweeping nonetheless. Gellhorn, A Decade of Desegregation—Retrospect and Prospect, 9 Utah L. Rev. 3 (1964). "What makes one uneasy, of course is the truly awesome magnitude of what has yet to be done." Marshall, *The Courts,* in Center for the Study of Democratic Institutions, The Maze of Modern Government 36 (1964), quoted in Pollak, Ten Years After the Decision, 24 Fed. Bar Jour. 123 (1964). On the first decade of desegregation, see generally, Sarratt, The Ordeal of Desegregation (1966); Legal Aspects of the Civil Rights Movement (D. B. King ed. 1965).

the results were meagre. The statistics speak eloquently. See Appendix B, Rate of Change and Status of Desegregation. In 1965 the public school districts in the consolidated cases now before this Court had a school population of 155,782 school children, 59,361 of whom were Negro. Yet under the existing court-approved desegregation plans, only 110 Negro children in these districts, .019 per cent of the school population, attend former "white" schools.[34] In 1965 there was no faculty desegregation in any of these school districts; indeed, none of the 30,500 Negro teachers in Alabama, Louisiana, and Mississippi served with any of the 65,400 white teachers in those states.[35] In the 1963-64 school year, the eleven states of the Confederacy had 1.17 per cent of their Negro students in schools with white students.[36] In 1964-65, undoubtedly because of the effect of the 1964 Act,

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	Total Enrollment		Negroes Admitted To Formerly White Schools
	W	N	
Bessemer, Ala.	2,920	5,284	13
Fairfield, Ala.	1,779	2,159	31
Jefferson County, Ala.	45,000	18,000	24
Caddo Parish, La.	30,680	24,467	1
Bossier Parish, La.	11,100	4,400	31
Jackson Parish, La.	2,548	1,609	5
Claiborne Parish, La.	2,394	3,442	5

(Affidavit of St. John Barrett, Attorney, Department of Justice, attached to Motion to Consolidate and Expedite Appeals.)

35 U. S. Dept. of Health, Education and Welfare, Office of Education Release, Table 3, September 27, 1965. In the 11 states of the Confederacy there are 1800 Negro teachers, 1.8 per cent of all the Negro teachers in Southern schools, assigned to schools with biracial faculties. By contrast, in the border states (Delaware, Kentucky, Maryland, Missouri, Oklahoma, and West Virginia) 51 per cent of the Negro teachers now teach white students. Ibid.

36 Southern Education Reporting Service, Statistical Summary, Dec. 1965, cited in U.S. Comm. on Civil Rights, Survey of School Desegregation in the Southern and Border States 1965-66, p. 1.

the percentage doubled, reaching 2.25. For the 1965-66 school year, this time because of HEW Guidelines, the percentage reached 6.01 per cent. In 1965-66 the entire region encompassing the Southern *and border states* had 10.9 per cent of their Negro children in school with white children; 1,555 biracial school districts out of 3,031 in the Southern and border states were still fully segregated; 3,101,043 Negro children in the region attended all-Negro schools. Despite the impetus of the 1964 Act, the states of Alabama, Louisiana, and Mississippi, still had less than one per cent of their Negro enrollment attending schools with white students.[37]

The dead hand of the old past and the closed fist of the recent past account for some of the slow progress. There are other reasons—as obvious to Congress as to courts. (1) Local loyalties compelled school officials and elected officials to make a public record of their unwillingness to act. But even school authorities willing to act have moved slowly because of uncertainty as to the scope of their duty to act affirmatively. This is attributable to (a) a misplaced reliance on the *Briggs* dictum that the Constituition "does not require integration",[38] (b) a misunderstanding of the *Brown II* mandate, desegregate with "due deliberate speed",[39] and (c) a mistaken no-

[37] *Ibid.;* see footnote 3; Appendix B, Rate of Change and Status of Desegregation.

[38] See Section III A of this opinion.

[39] In Davis v. Board of School Commissioners of Mobile County, 5 Cir. 1966, 364 F.2d 896, 898, Judge Tuttle, for the Court, said: "This is the fourth appearance of this case before this court. This present appeal, coming as it does from an order of the trial court entered nearly eighteen months ago, on March 31, 1965, points up, among other things, the utter impracticability of a

tion that transfers under the Pupil Placement Laws satisfy desegregation requirements.[40] (2) Case by case development of the law is a poor sort of medium for reasonably prompt and uniform desegregation. There are natural limits to effective legal action. Courts cannot give advisory opinions, and the disciplined exercise of the judicial function properly makes courts reluctant to move forward in an area of the

continued exercise by the courts of the responsibility for supervising the manner in which segregated school systems break out of the policy of complete segregation into gradual steps of compliance and towards complete compliance with the constitutional requirements of Brown v. Board of Education, 347 U.S. 483. One of the reasons for the impracticability of this method of overseeing the transitional stages of operations of the school boards involved is that, under the Supreme Court's 'deliberate speed' provisions, it has been the duty of the appellate courts to interpret and reinterpret this language as time has grown apace, it now being the twelfth school year since the Supreme Court's decision."

[40] "The pupil assignment acts have been the principal obstacle to desegregation in the South." U. S. Comm. on Civil Rights, Civil Rights U.S.A.—Public Schools, Southern States 15, 1962. See Note, The Federal Courts and Integration of Southern Schools: Troubled Status of the Pupil Placement Acts, 62 Colum. L. Rev. 1448, 1471-73 (1962); Bush v. Orleans Parish School Board, 5 Cir. 1962, 308 F.2d 491. Such laws allow carefully screened Negro children, *on their application,* to transfer to white schools from the segregated schools to which the Negroes were initially unconstitutionally assigned. Often, even after six to eight years of no desegregation, these transfers were limited to a grade a year. When this law first came before us we held it to be unconstitutional. Bush v. Orleans Parish School Board, E.D.La. 1956, 138 F. Supp. 337, *aff'd* 242 F.2d 156, *cert. den'd* 354 U.S. 921 (1957). Later, in a narrowly focused opinion, we held that the Alabama version was constitutional *on its face.* Shuttlesworth v. Birmingham Board of Education, N.D.Ala. 1958, 162 F.Supp. 372, aff'd per curiam, 358 U.S. 101 (1958). As long ago as 1959 and 1960 this Court disapproved of such acts as a reasonable start toward full compliance. Gibson v. Board of Public Instruction of Dade County, 272 F.2d 763; Mannings v. Board of Public Instruction of Hillsborough County, 277 F.2d 370. See also Bush v. Orleans Parish School Board, 5 Cir. 1961, 308 F.2d 491; Evers v. Jackson Municipal Separate School District, 5 Cir. 1964, 328 F.2d 408. "[T]he entire public knows that in fact [the Louisiana law] . . . is being used to maintain segregation. . . . It is not a plan for desegregation at all." Bush v. Orleans Parish School Board, 308 F. 2d at 499-500.

law bordering the periphery of the judicial domain. (3) The contempt power is ill-suited to serve as the chief means of enforcing desegregation. Judges naturally shrink from using it against citizens willing to accept the thankless, painful responsibility of serving on a school board.[41] (4) School desegregation plans are often woefully inadequate; they rarely provide necessary detailed instructions and specific answers to administrative problems.[42] And most judges do not have sufficient competence—they are not educators or school administrators—to know the right questions, much less the right answers. (5) But one reason more than any other has held back desegregation of public schools on a large scale. This has been the lack, until 1964, of effective congressional

[41] Bush v. Orleans Parish School Board is an example. The board was plagued by bundles of Louisiana statutes aimed at defeating desegregation. There were five extra sessions of the Louisiana legislature in 1960. After the School Board had for three years failed to comply with an order to submit a plan, the district judge wrote one himself. The trial judge simply said: "All children [entering New Orleans public schools . . . may attend either the formerly all white public schools nearest their homes, or the formerly all Negro public schools nearest their homes, at their option. B. Children may be transferred from one school to another, provided such transfers are not based on race". 204 F.Supp. 568, 571-72.

[42] For example, the order of the able district judge in *Bush*. See footnote 41. Judge Bohanon underscored this point in Dowell v. School Board of Oklahoma City Public Schools, W.D.Okla. 1965, 244 F. Supp. 971, 976: "The plan submitted to this Court . . . is not a plan, but a statement of policy. School desegregation is a difficult and complicated matter, and, as the record shows, cannot be accomplished by a statement of policy. ¶ Desegregation of public schools in a system as large as Oklahoma City requires a definite and positive plan providing definable and ascertainable goals to be achieved within a definite time according to a prepared procedure and with responsibilities clearly designated."

statutory recognition of school desegregation as the law of the land.[43]

"Considerable progress has been made . . . Nevertheless, in the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious."[44] Title VI of the Civil Rights Act of 1964, therefore, was not only appropriate and proper legislation under the Thirteenth and Fourteenth Amendments; it was necessary to

[43] The Civil Rights Act of 1964 had its direct genesis in President Kennedy's message to Congress of June 19, 1963, urging passage of an omnibus civil rights law. He noted: "In the continued absence of congressional action, too many state and local officials as well as businessmen will remain unwilling to accord these rights to all citizens. Some local courts and local merchants may well claim to be uncertain of the law, while those merchants who do recognize the justice of the Negro's request (and I believe these constitute the great majority of merchants, North and South) will be fearful of being the first to move, in the face of official customer, employee, or competitive pressures. Negroes, consequently, can be expected to continue increasingly to seek the vindication of these rights through organized direct action, with all its potentially explosive consequences, such as we have seen in Birmingham, in Philadelphia, in Jackson, in Boston, in Cambridge, Md., and in many other parts of the country. ¶ In short, the result of continued Federal legislative inaction will be continued, if not increased, racial strife—causing the leadership on both sides to pass from the hands of reasonable and responsible men to the purveyors of hate and violence, endangering domestic tranquillity, retarding our nation's economic and social progress and weakening the respect with which the rest of the world regards us. No American, I feel sure, would prefer this course of tension, disorder, and division—and the great majority of our citizens simply cannot accept it." H.Doc. 124, 88th Cong. 1st Sess. June 20, 1963, Rep. Emanuel Celler, Chairman of the House Judiciary Committee, introduced H.R. 7152 embodying the President's proposals. The same day Senator Mike Mansfield introduced a similar bill, S. 1731. H.R. 7152-S.1731, as amended, became the Civil Rights Act of 1964.

[44] H. Rep. No. 914, 88th Cong., 1st Sess.

rescue school desegregation from the bog in which it had been trapped for ten years.[45]

The Civil Rights Commission, doubtless better able than any other authority to understand the significance of the Civil Rights Act of 1964, had this to say about Title VI:

> "This statute heralded a new era in school desegregation . . . Most significantly . . . Federal power was to be brought to bear in a manner which promised speedier and more substantial desegregation than had been achieved through the voluntary efforts of school boards and district-by-district litigation. . . . During fiscal year 1964, $176,546,992 was distributed to State and local school agencies in the 17 Southern and border States. The passage of the Elementary and Secondary Education Act of 1965 added an additional appropriation of $589,946,135 for allocation to the 17 Southern and border States for fiscal year 1966. With funds of such magnitude at stake, most school systems would be placed at a serious disadvantage by termination of Federal assistance."[46]

[45] "It was the Congressional purpose, in Title VI of the Civil Rights Act of 1964, to remove school desegregation efforts from the courts, where they had been bogged down for more than a decade. Unless the power of the Federal purse is more effectively utilized, resistance to national policy will continue and, in fact, will be reinforced." Report of the White House Conference "To Fulfill These Rights", June 1-2, 1966, p. 63.

[46] Rep. U. S. Comm. on Civil Rights, Survey of School Desegregation in the Southern and Border States—1965-66, p. 2.

B. The congressional mandate, as embodied in the Act and as carried out in the HEW Guidelines, does not conflict with the proper exercise of the judicial function or with the doctrine of separation of powers. It does however profoundly affect constructive use of the judicial function within the lawful scope of sound judicial discretion. When Congress declares national policy, the duty the two other coordinate branches owe to the Nation requires that, within the law, the judiciary and the executive respect and carry out that policy. Here the Chief Executive acted promptly to bring about uniform standards for desegregation. The judicial branch too should cooperate with Congress and the executive in making administrative agencies effective instruments for supervising and enforcing desegregation of public schools. Justice Harlan F. Stone expressed this well:

> "Legislatures create administrative agencies with the desire and expectation that they will perform efficiently the tasks committed to them. That, at least, is one of the contemplated social advantages to be weighed in resolving doubtful construction. Its aim is so obvious as to make unavoidable the conclusion that the function which courts are called upon to perform, in carrying into operation such administrative schemes, is constructive, not destructive, to make administrative agencies, whenever reasonably possible, effective

instruments for law enforcement, and not to destroy them."[47]

In an analogous situation involving enforcement of the Fair Labor Standards Act, the Supreme Court has said, "Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons." *Skidmore v. Swift & Co.*, 1944, 323 U. S. 134, 65 S.Ct. 161, 89 L.Ed. 124. In an appeal from the district court's denial of an injunction to enforce labor standards under the Act this Court has pointed out:

> ". . . this proceeding is only superficially related to a suit in equity for an injunction to protect interests jeopardized in a private controversy. The public interest is jeopardized here. The injunctive processes are a means of effecting general compliance with national

[47] Stone, The Common Law in the United States, 50 Harv. L. Rev. 1, 18 (1936). In a similar vein, writing for the Court, Justice Stone has said: ". . . in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim." United States v. Morgan, 1939, 307 U. S. 183, 191, 59 S. Ct. 795, 799, 83 L.Ed. 1211.

> policy as expressed by Congress, a public policy judges too must carry out—actuated by the spirit of the law and not begrudgingly as if it were a newly imposed fiat of a presidium. . . . Implicit in the defendants' non-compliance, as we read the briefs and the record, is a certain underlying, not unnatural, Actonian distaste for national legislation affecting local activities. But the Fair Labor Standards Law has been on the books for twenty-three years. The Act establishes a policy for all of the country, and for the courts as well as for the agency required to administer the law. Mitchell v. Pidcock, 5 Cir. 1962, 299 F.2d 281, 287, 288.

C. We must therefore cooperate with Congress and the Executive in enforcing Title VI. The problem is: Are the HEW Guidelines within the scope of the congressional and executive policies embodied in the Civil Rights Act of 1964. We hold that they are.

The Guidelines do not purport to be a rule or regulation or order. They constitute a statement of policy under section 80.4(c) of the HEW Regulations issued after the President approved the regulations December 3, 1964. HEW is under no statutory compulsion to issue such statements. It is, however, of manifest advantage to school boards throughout the country and to the general public to know the criteria the Commissioner uses in determining whether a

school meets the requirements for eligibility to receive financial assistance.

The Guidelines have the vices of all administrative policies established unilaterally without a hearing. Because of these vices the courts, as the school boards point out, have set limits on administrative regulations, rulings, policies, and practices: an agency construction of a statute cannot make the law; it must conform to the law and be reasonable. To some extent the administrative weight of the declarations depends on the place of such declarations in the hierarchy of agency pronouncements extending from regulations down to general counsel memoranda and inter-office decisions. See *Manhattan General Electric Company v. Commissioner,* 1936, 297 U. S. 129, 56 S.Ct. 397, 80 L.Ed. 528; *United States v. Bennett,* 5 Cir. 1951, 186 F.2d 407; *United States v. Mississippi Chemical Corporation,* 5 Cir. 1964, 326 F. 2d 569; *Chattanooga Auto Club v. Commissioner,* 6 Cir. 1950, 182 F.2d 551.

These and similar decisions are not inconsistent with the courts' giving great weight to the HEW's policy statements on enforcement of Title VI. In *Skidmore v. Swift & Co.,* 323 U.S. 134, an action was commenced in a federal district court by employees of Swift & Co. to recover wages at the overtime rates prescribed by the Fair Labor Standards Act (52 Stat. 1060, et seq.) for certain services which they had performed. At issue was whether these services constituted "employment" within the meaning of sec-

tion 7 (a) of that act. The district court and this Court, on appeal, decided this issue against the plaintiffs. The Supreme Court reversed. After acknowledging (323 U.S. at 137) that the statute had granted no rule-making power to the Wage and Hour Administrator with respect to the issue at hand ("[i]nstead, it put this responsibility on the courts"), the Court referred to an "Interpretative Bulletin" issued by the Administrator containing his interpretation of the statutory phrase in question. The Supreme Court said:

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[48]

[48] The Supreme Court also stated in *Skidmore,* 323 U. S. at 139-40: "The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized

The Supreme Court found that the lower courts had misunderstood their function vis-a-vis the Interpretative Bulletin and remanded the case. See also, *United States v. American Trucking Association*, 1940, 310 U. S. 543, 549; *Goldberg v. Servas*, 1 Cir. 1961, 294 F.2d 841, 847.

The national importance of the HEW Guidelines, the evident thoroughness with which these standards were prepared and formulated by educational authorities, the similarity of the HEW standards to the standards this Court and the Supreme Court have established, and the manifest effort of the Office of Education to be faithful to the congressional objectives of the 1964 Civil Rights Act entitle the HEW Guidelines to greater weight by the courts than run-of-the-mine policy statements low in the hierarchy of administrative declarations.

Courts therefore should cooperate with the congressional-executive policy in favor of desegregation and against aiding segregated schools.

D. Because our approval of a plan establishes eligibility for federal aid, our standards should not be lower than those of HEW. Unless judicial stand-

experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. *Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons.*" (Emphasis added.)

ards are substantially in accord with the Guidelines, school boards previously resistant to desegregation will resort to the courts to avoid complying with the minimum standards HEW promulgates for schools that desegregate voluntarily. As we said in *Singleton I*:

> "If in some district courts judicial guides for approval of a school desegregation plan are more acceptable to the community or substantially less burdensome than H.E.W. guides, school boards may turn to the federal courts as a means of circumventing the H.E.W. requirements for financial aid. Instead of a uniform policy relatively easy to administer, both the courts and the Office of Education would have to struggle with individual school systems on ad hoc basis. If judicial standards are lower, recalcitrant school boards in effect will receive a premium for recalcitrance; the more the intransigence, the bigger the bonus." 348 F.2d at 731.

In *Kemp v. Beasley*, 8 Cir. 1965, 352 F.2d 14, the Court concluded:

> "[HEW] standards must be heavily relied upon. . . . Therefore, to the end of promoting a degree of uniformity and discouraging reluctant school boards from reaping a benefit from their reluctance the courts should endeavor to model their standards after those

promulgated by the executive." 352 F.2d at 18, 19.

Concurring, Judge Larson, speaking from his experience as a district judge, pointed out that school boards which do not act voluntarily retard the desegregation process to the disadvantage of the individual's constitutional rights: "Judicial criteria", therefore, "should probably be more stringent" than HEW Guidelines:

> "A school board which fails to act voluntarily forces Negro students to solicit aid from the courts. This not only shifts the burden of initiating desegregation, but inevitably means delay in taking the first step. As Judge Gibson observes, we are not here concerned with regulating the flow of Federal funds. Our task is to safeguard basic constitutional rights. Thus, our standards should be directed toward full, complete, and final realization of those rights." 352 F.2d at 23.

The announcement in HEW regulations that the Commissioner would accept a final school desegregation order as proof of the school's eligibility for federal aid prompted a number of schools to seek refuge in the federal courts. Many of these had not moved an inch toward desegregation.[49] In Louisiana

[49] The following statement appeared in the Shreveport Journal for July 1, 1965: "The local school boards prefer a court order over the voluntary plan because HEW regulations governing the voluntary plans or compliance agreements demand complete desegregation of the entire system, including students, faculty, staff, lunch workers, bus drivers, and administrators, whereas the court-ordered plans can be more or less negotiated with the judge." This was not news to the Court.

alone twenty school boards obtained quick decrees providing for desegregation according to plans greatly at variance with the Guidelines.[50]

We shall not permit the courts to be used to destroy or dilute the effectiveness of the congressional policy expressed in Title VI. There is no bonus for foot-dragging.

E. The experience this Court has had in the last ten years argues strongly for uniform standards in court-supervised desegregation.

The first school case to reach this Court after *Brown v. Board of Education* was *Brown v. Rippey*, 5 Cir. 1956, 237 F.2d 796. Since then we have reviewed 41 other school cases, many more than once.[51] The

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[50] We may also expect a number of school desegregation suits to be filed in Alabama. The legislature has enacted a statute declaring the Guidelines null and void in Alabama and prohibiting school officials signing any agreement to comply. The bill provides that any agreement or assurance of compliance with the guidelines already in effect "is null and void and shall have no binding effect." H.B. 446, approved September 2, 1966.

[51] The brief of the United States gives the following figures:

"1. Case Load

	District Court	Court of Appeals	Supreme Court
Number of Cases	128	42	5
Number of Orders Entered	513	76	10

2. Frequency of Appeals to this Court

Number of Cases With One or More Appeals	42
Number of Cases With Two or More Appeals	21
Number of Cases With Three or More Appeals	8
Number of Cases With Four or More Appeals	4
Number of Cases With Five or More Appeals	2

In Bush v. Orleans Parish School Board the complaint was filed September 5, 1952. Bush's peregrinations through the courts are reported as follows: 138 F.Supp. 336 (3-judge 1956) motion for leave to file petition for mandamus denied, 351 U. S. 948 (1956); 138 F. Supp. 337

district courts in this circuit have considered 128 school cases in the same period. Reviewing these cases imposes a taxing, time-consuming burden on the courts not reflected in statistics. An analysis of the cases shows a wide lack of uniformity in areas where there is no good reason for variations in the schedule and manner of desegregation.[52] In some cases there has been a substantial time-lag between this Court's opinions and their application by the district courts.[53] In certain cases—which we consider unnecessary to cite—there has even been a manifest variance between this Court's decision and a later district court decision. A number of district courts still mistakenly assume that transfers under Pupil Placement Laws—superimposed on unconstitutional initial assignment—satisfy the requirements of a desegregation plan. The lack of clear and uniform standards to govern school boards has tended to put a premium on delaying actions. In sum, the lack of uniform standards has retarded the development of

(1956), aff'd 242 F.2d 156 (1957), cert. den'd, 354 U.S. 921 (1957); 252 F.2d 253, cert. den'd 356 U.S. 969 (1958); 163 F. Supp. 701 (1958), aff'd, 268 F.2d 78 (1959); 187 F. Supp. 42 (3-judge 1960), motion to stay den'd, 364 U.S. 803 (1960), aff'd 365 U.S. 569 (1961); 188 F. Supp. 916 (3-judge 1960), motion for stay denied, 364 U.S. 500 (1960), aff'd, 365 U.S. 569 (1961); 190 F. Supp. 861 (3-judge 1960), aff'd 366 U.S. 212 (1961); 191 F. Supp. 871 (3-judge 1961), aff'd 367 U.S. 908 (1961); 194 F. Supp. 182 (3-judge 1961), aff'd, 367 U.S. 907 (1961), 368 U.S. 11 (1961); 204 F. Supp. 568 (1962); 205 F. Supp. 893 (1962), aff'd in part and rev'd in part, 308 F.2d 491 (1962); 230 F. Supp. 509 (1963).

[52] Of the 99 court-approved freedom of choice plans in this circuit, 44 do not desegregate all grades by 1967; 78 fail to provide specific, non-racial criteria for denying choices; 79 fail to provide any start toward faculty desegregation; only 22 provide for transfers to take courses not otherwise available; only 4 include the *Singleton* transfer rule.

[53] See footnote 39.

local responsibility for the administration of schools without regard to race or color. What was true of an earlier Athens and an earlier Rome is true today: In Georgia, for example, there should not be one law for Athens and another law for Rome.

Before HEW published its Guidelines, this Court had already established guidelines for school desegregation: to encourage uniformity at the district court level and to conserve judicial effort at both the district court and appellate levels. We did so by making detailed suggestions to the district courts. *Lockett v. Board of Education of Muscogee County,* 5 Cir. 1964, 342 F.2d 225; *Bivens v. Board of Education for Bibb County,* 5 Cir. 1965, 242 F.2d 229; *Armstrong v. Board of Education of Birmingham,* 5 Cir. 1964, 333 F.2d 47; *Davis v. Board of School Commissioners of Mobile County,* 5 Cir. 1964, 333 F.2d 53; *Stell v. Savannah-Chatham County Board of Education,* 5 Cir. 1964, 333 F.2d 55; *Gaines v. Dougherty County Board of Education,* 5 Cir. 1964, 334 F.2d 983. In other areas of the law involving recurrent problems of regional or national interest, this Court has also found guidelines advantageous. In *United States v. Ward,* 5 Cir. 1965, 347 F.2d 795, and *United States v. Palmer,* 5 Cir. 1966, 356 F.2d 951, suits to enjoin registrars of voters from discriminating against Negroes, we attached identical proposed decrees for the guidance of district courts.[54] See also

[54] In *Ward* the Court said: "[G]ood administration suggests that the proposed decree be indicated by an Appendix, not because of any apprehension that the conscientious District Judge would not faithfully impose every condition so obviously implied, but rather because of factors bearing upon administration

Scott v. Walker, 5 Cir. 1966, 358 F.2d 561, one of a series of cases on the exclusion of Negroes from juries.

F. We summarize the Court's policy as one of encouraging the maximum legally permissible correlation between judicial standards for school desegregation and HEW Guidelines. This policy may be applied without federal courts' abdicating their proper judicial function. The policy complies with the Supreme Court's increasing emphasis on more speed and less deliberation in school desegregation.[55] It is consistent with the judiciary's duty to the Nation to cooperate with the two other coordinate branches of government in carrying out the national policy expressed in the Civil Rights Act of 1964

III.

The defendants contend that the Guidelines require integration, not just desegregation; that school boards have no affirmative duty to integrate. They say that

itself. It is not possible, or even desirable, of course to achieve absolute uniformity. But in this ever growing class of cases which have their genesis in unconstitutional lack of uniformity as between races, courts within this single circuit should achieve a relative uniformity without further delay." 349 F.2d at 805.

[55] "There has been entirely too much deliberation and not enough speed in enforcing the constitutional rights which we held in Brown v. Board of Education had been denied Prince Edward County Negro children." Griffin v. County School Board of Prince Edward County, 1964, 377 U.S. 218, 229, 84 S.Ct. 1226, 12 L.Ed.2d 256, 264. See also Rogers v. Paul and Bradley v. School Board of the City of Richmond, 1965, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187. "*Brown* never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools. . . ." (Goldberg, J.) Watson v. City of Memphis, 1963, 373 U.S. 526, 530, 83 S.Ct. 1314, 1317, 10 L.Ed.2d 529, 534.

in this respect the Guidelines are contrary to the provisions of the Civil Rights Act of 1964 and to constitutional intent expressed in the Act. *This argument rests on nothing that the United States Supreme Court held or said in Brown or in any other case.* It rests on two glosses on *Brown*: the opinions in *Briggs v. Elliott,* E.D.S.C. 1955, 132 F. Supp. 776 and *Bell v. School City of Gary,* N.D. Ind. 1963, 213 F. Supp. 819, aff'd, 7 Cir. 1963, 324 F.2d 209. *Briggs,* decided only six weeks after *Brown II,* is one of the earliest cases in this field of law. The portion of the opinion most quoted is pure dictum. *Briggs* did not paraphrase the law as the Supreme Court stated it in *Brown* or as the law must be stated today in the light of *Aaron v. Cooper, Rogers v. Paul* and *Bradley v. School Board.* These and other decisions compel states in this circuit to take affirmative action to reorganize their school systems by integrating the students, faculties, facilities, and activities. As for *Bell,* it is inapplicable to cases in this circuit, all of which involve formerly de jure segregated schools. Although the legislative history of the statute shows that the floor managers for the Act and other members of the Senate and House cited and quoted these two opinions they did so within the context of the problem of de facto segregation. A study of the Guidelines shows that the HEW standards are within the rationale of *Brown* and the congressional objectives of the Act.

A. *Briggs,* an action to desegregate the public schools in Clarendon County, South Carolina, was one

of the school cases consolidated with *Brown v. Board of Education of Topeka, Kansas.* On remand, a distinguished court (Parker and Dobie, Circuit Judges, and Timmerman, District Judge) felt that it was important to "point out exactly what the Supreme Court has decided and what it has not decided." The Court said:

> "It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . *The Constitution, in other words, does not require integration. It merely forbids segregation.*" 132 F. Supp. at 777.

Ten years later Clarendon County schools were still totally segregated.[56]

This Court and other courts, gratuitously for the most part, have often paraphrased or quoted with approval the *Briggs* dictum.[57] It is not surprising,

[56] See Brunson v. Board of Trustees of School District No. 1, 4 Cir. 1962, 311 F.2d 107; Southern Education Reporting Service, Statistical Summary, Nov. 1964, p. 46.

[57] The Fifth Circuit cases are: Borders v. Rippy, 1957, 247 F.2d 268, 271; Boson v. Rippy, 1960, 285 F.2d 43, 48; Lockett v. Board of Education of Muscogee County, 5 Cir. 1965, 342 F.2d 225; Avery v. Wichita Falls Independent School District, 1956, 241 F.2d 230, 233; Stell v. Savannah-Chatham County Board of Education, 1964, 333 F.2d 55, 59; Evers v. Jackson, 1964, 328 F.2d 408; cf.

therefore, that *Briggs* prompted Pupil Placement Laws, the most effective technique for perpetuating school segregation. And it is not surprising that school officials—the *Briggs* dictum dinned into their ears for a decade—have not now faced up to faculty integration. However, as this Court's experience in handling school cases increased, the Court became aware of the frustrating effects of *Briggs*. In *Singleton I* we referred to the dictum as "inconsistent with Brown [II] and the later development of decisional and statutory law in the area of civil rights." 348 F. 2d at 730 n.5. In *Singleton II* we called it an "oversimplified" construction of *Brown I*. We added: "The Constitution forbids unconstitutional state action in the form of segregated facilities, including segregated public schools. School authorities, therefore, are under the constitutional compulsion of furnishing a single, integrated school system." 355 F.2d at 369.

Cohen v. Public Housing Administration, 1958, 257 F.2d 73 (public housing); City of Montgomery v. Gilmore, 1960, 277 F.2d 364 (public parks). For a list of cases in other circuits see footnotes 10 and 11 in Blocker v. Board of Education of Manhasset, E.D.N.Y. 1964, 226 F. Supp. 208, 220. In *Blocker* Judge Zavitt notes that "the construction draws continuing sustenance through a process in which each case relies upon a preceding one; it would appear that the ultimate and solitary source is this dictum in Briggs v. Elliott." 226 F. Supp. at 220.

In Borders v. Rippy, 5 Cir. 1957, 247 F.2d 268, the Court reversed the judgment of the district court dismissing the complaint and directed the entry of a judgment enjoining the defendants "from requiring segregation of the races in any school under their supervision". On remand, the district court entered an order enjoining the defendants "from requiring or *permitting* segregation of the races in any school under their supervision". On the second appeal, in Rippy v. Borders, 5 Cir. 1957, 250 F.2d 690, 692, the Court again reversed the district court, stating: "We have emphasized the words *'or permitting segregation of the races'* in the district court's order because that expression might indicate a serious misconception of the applicable law and of the mandate of this Court. Our mandate (footnote 1, supra) had been carefully limited so as to direct the entry of a judgment restraining and enjoining the defendants *'from requiring segrega-*

Other federal courts have disapproved of the *Briggs* dictum.[58]

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tion of the races in any school under their supervision' (emphasis supplied). Likewise in our opinion, we had pointed out that is only *racially discriminatory* segregation in the public schools which is forbidden by the Constitution."

[58] In Kemp v. Beasley the Eighth Circuit remarked, "The dictum in *Briggs* has not been followed or adopted by this Circuit and is logically inconsistent with Brown." Blocker v. Board of Education of Manhasset, E.D.N.Y. 1964, 226 F.Supp. 208, makes a frontal attack on *Briggs*. In that case, which concerned segregation characterized as *de jure,* Judge Zavitt observed that even where the *Briggs* dictum has seemingly been adopted, "it appears to be in a state of diminishing force, if not outright erosion", citing Dillard v. School Board of the City of Charlottesville, 4 Cir. 1962, 308 F.2d 920, *cert. denied,* 374 U.S. 827 (1963), and McCoy v. Greensboro City Board of Education, 4 Cir. 1960, 283 F.2d 667. The Third Circuit, reversing a district court's approval of a year-by-year plan, ignored *Briggs:* "if the plan as approved by the court below be not drastically modified, a large number of the Negro children of Delaware will be deprived of education *in integrated* schools, despite the fact that the *Supreme Court has unqualifiedly declared integration to be their constitutional right."* (Emphasis added.) Evans v. Ennis, 3 Cir. 1960, 281 F.2d 385, 389, *cert. den'd* 364 U.S. 933. In Evans v. Ennis, only three school districts were involved. Nevertheless, the court required the district judge to order the State Board of Education and the State Superintendent of Delaware to prepare "a plan which will provide for the *integration* of all grades of the public school system of Delaware." "Eventually", Judge Biggs said, "a wholly integrated school system will be effected for Delaware: 'wholly integrated' in the sense that all school children, whether white or Negro, . . . will attend schools without regard to race or color." Sometimes a court's action in regard to the school board's affirmative duty has spoken louder than *Briggs's* words. In Evans v. Buchanan, D.C. Del. 1962, 207 F. Supp. 820, although the court cited *Briggs* and stated that the Fourteenth Amendment "does not contemplate compelling action; rather it is a prohibition preventing the States from applying their laws unequally", the court did compel the school boards to act. The Court found that the Negro school children who wished to attend integrated schools were attending an all-Negro school, with an all-Negro faculty, surrounded by white attendance area. On those bare facts, the Court found: "The . . . Board as promulgator of the plan and the State Board of Education as the party having the ultimate responsibility for administering a nondiscriminatory system of public education should have the initial burden of coming forward *since a presumption of unconstitutionality arises* under this set of facts." 207 F. Supp. at 825. (Emphasis added.) The facts were "highly probative" of intentional

The *Briggs* dictum may be explained as a facet of the Fourth Circuit's now abandoned view that Fourteenth Amendment rights are exclusively individual rights and in school cases are to be asserted individually after each plaintiff has exhausted state administrative remedies.[59] The Court disallowed class suits because Negro students who had not asked for transfers to white schools had not individually exhausted their remedies and were therefore not similarly situated with the plaintiffs. Thus in *Carson v. Warlick,* 4 Cir. 1956, 238 F.2d 724, Judge John Parker, for the Court, stated:

> "There is no question as to the right of these [Negro] school children. . . . They are to be admitted, however, as individuals, not as a class or group; and it is as individuals that their rights under the Constitution are asserted. . . . [The] school board must pass upon individual applications made individually to the board. . . ." 238 F.2d at 729.

In *Covington v. Edwards,* 4 Cir. 1959, 264 F.2d 780, 783, the court commented that "the County board has taken no steps to put an end to the planned segre-

racial discrimination and the evidence of intent rested largely with the Board. The Board came forward and showed that its plan was based on such neutral factors as the safety of the children, facilities, location, and access roads. The court, however, held that the Board did not rebut the presumption by showing that the plan could be justified as rational and nondiscriminatory. The obviously sophisticated trial judge observed, "In effect, counsel is asking the States to intentionally gerrymander districts which may be rational when viewed by acceptable, nondiscriminatory criteria". *Id.* at 824.

[59] See U. S. Comm. on Civil Rights, Civil Rights U.S.A.—Public Schools, Southern States (1962), p. 7.

gation", but still held for the board for failure of the plaintiffs to exhaust their remedies and for filing the suit as a class action. In a later opinion in this case, sub.nom. *Jeffers v. Whitley,* 309 F.2d 621, the Court found that the plaintiffs had failed to establish that they were "denied any constitutional right because of their race or color". The court observed,

> "It can fairly be said that what the children and their parents are still seeking is only a desegregation of the Conwell County School System rather than a protection of their own rights. . . ."

The Fourth Circuit abandoned this view in *Green v. School Board of the City of Roanoke,* 4 Cir. 1962, 304 F.2d 118, holding that since administrative remedies need not be exhausted, a class suit is proper. "[It] would be almost a cruel joke to say that administrative remedies must be exhausted when it is known that such exhaustion of remedies will not terminate the pattern of a racial assignment." *Jackson v. School Board of City of Lynchburg,* W.D. Va. 1962, 201 F. Supp. 620. *McNeese v. Board of Education for School District 187,* 1963, 373 U. S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622, put beyond debate the need to exhaust remedies and the right of Negro students to file a class action. See also *Armstrong v. Board of Education of the City of Birmingham,* 5 Cir. 1963, 323 F.2d 333, cert. denied sub.nom. *Gibson v. Harris,* 376 U.S. 905 (1964).

In the sense that an individual pupil's right under the equal protection clause is a "personal and present" right not to be discriminated against by being segregated,[60] the dictum is a cliché. The Fourteenth Amendment provides, "nor shall any state . . . deny to any *person* within its jurisdiction the equal protection of the laws". The dictum may also be defensible, if the *Briggs* court used the term "integration" to mean an absolute command at all costs that each and every Negro child attend a racially balanced school.[61] But what is wrong about the dictum is more important than what is right about it. What is wrong about *Briggs* is that it drains out of *Brown* that deci-

[60] For example: ". . . the essence of the constitutional right is that it is a personal one. . . . It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded". McCabe v. Atchison, T. & S.F. Ry., 1914, 235 U. S. 151, 161-62, 35 S.Ct. 69, 59 L.Ed. 169. The legislative history of the 14th Amendment provides no information on this point. See Frank and Munro, The Original Understanding of Equal Protection of the Laws, 50 Colum. L. Rev. 131 (1950); Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1 (1955). But "the personal nature of the right to be free from discrimination was declared in order to make the existence of such right independent of the number of other members of the *same* racial group who were victimized by the discrimination. . . ." Hartman, The Right to Equal Educational Opportunities as a Personal and Present Right, 9 Wayne L. Rev. 424, 427 (1963).

[61] What is meant by the statement of "no duty to integrate" is that a school board "does not have to completely alter boundaries and to insure that every school district is mixed, even though some students will have a great distance to travel . . . [E]ven though the state is not required to integrate fully every school and child, this does not mean that the state may not have certain responsibilities to children of a minority race while educating them, the failure to perform which may be unconstitutional". Sedler, School Segregation in the North and West: Legal Aspects, 7 St. Louis U.L.J. 228, 251 (1963). See also the discussion of Barksdale v. Springfield School Comm., at 65-67, infra.

sion's significance as a class action to secure equal educational opportunities for Negroes by compelling the states to reorganize their public school systems.[62] All four of the original *School Segregation* cases were class actions and described as such in the opinions. 347 U. S. at 455.

We do not minimize the importance of the Fourteenth Amendment rights of an individual, but there

[62] Rule 23a, Fed. R. Civ. P., before the recent amendments, was unclear as to whether a favorable decree applies to members of the class who do not join in the suit. *Compare* 3 Moore, Federal Practice 3434 (2d Ed.) *with* Chafee, Some Problems in Equity 199-295 (1950). "In dealing with [segregation] cases, courts have largely disregarded Moore's classifications, and have indicated that an injunction would run to the benefit of absentees." Developments in the Law—Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 935 (1958). Citing *Brown II,* 349 U. S. at 300-301 dictum; *Brown I,* 347 U. S. at 495 (dictum); Orleans Parish School Board v. Bush, 5 Cir. 1957, 242 F.2d 156, 165-66 (dictum); Browder v. Gayle, M.D. Ala. 1956, 142 F. Supp. 707, 711, 714, aff'd per curiam, 352 U. S. 903 (1956); Frasier v. Board of Trustees of University of North Carolina, M.D.N.C. 1955, 134 F. Supp. 589, *aff'd per curiam,* 350 U. S. 979 (1956).

"Violations of the Fourteenth Amendment are of course violations of individual or personal rights, but where they are committed . . . generally because of race, they are no less entitled to be made the subject of class actions and class adjudications under Rule 23. . . . than are other several rights." Kansas City v. Williams, 8 Cir. 1953, 205 F.2d 47, 52, *cert. denied* 346 U. S. 826 (1953). See also Holmes v. City of Atlanta, N. D. Ga. 1954, 124 F. Supp. 290, aff'd 223 F.2d 93, judgment vacated and remanded for a broader decree in conformity with Mayor and City of Baltimore v. Dawson, 350 U. S. 977 (1955); Jeffers v. Whitley, 4 Cir. 1962, 309 F.2d 621; Brunson v. Board of Trustees of School District No. 1, 4 Cir. 1962, 311 F.2d 107, *cert. denied* 373 U. S. 933 (1963).

See Comment, The Class Action Device in Antisegregation Cases, 20 U. Chi. L. Rev. 577 (1953). See also Comment, Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 935; McKay, "With All Deliberate Speed"—A Study of School Desegregation, 31 N.Y.U.L. Rev. 991, 1084-86 (1956); Class Actions—A Study of Group Interest Litigation, 1 Race Rel. Rep. 991 (1956); Meador, The Constitution and the Assignment of Pupils to Public Schools, 45 Va. L. Rev. 517, 523 (1959).

was more at issue in *Brown* than the controversy between certain schools and certain children. *Briggs* overlooks the fact that Negroes collectively are harmed when the state, by law or custom, operates segregated schools or a school system with uncorrected effects of segregation.

Denial of access to the dominant culture, lack of opportunity in any meaningful way to participate in political and other public activities, the stigma of apartheid condemned in the Thirteenth Amendment are concomitants of the dual educational system. The unmalleable fact transcending in importance the harm to individual Negro children is that the separate school system was an integral element in the Southern State's general program to restrict Negroes as a class from participation in the life of the community, the affairs of the State, and the mainstream of American life: Negroes must keep their place.[63]

"[S]egregation is a group phenomenon. Although the effects of discrimination are felt by each member of the group, any discriminatory practice is directed against the group as a unit and against individuals only as their connection with the group in-

[63] In United States v. Louisiana, E.D. La. 1963, 225 F. Supp. 353, aff'd 380 U.S. 145, the court traced the history of voting in Louisiana to show that the black codes, the grandfather clause, the white primary, literacy tests, and other devices were all members of a seemingly endless series designed to bar access of Negroes to the dominant culture and to political power. The same situation exists with regard to denial of equal educational opportunities. So-called freedom of choice plans, *as thus far utilized,* follow pupil placement laws, which followed the "separate-but-equal" dodge in the educational series of devices to limit access of Negroes to the polity.

volves the antigroup sanction. . . . [As] a group-wrong . . . the mode of redress must be group-wide to be adequate."[64] Adequate redress therefore calls for much more than allowing a few Negro children to attend formerly white schools; it calls for liquidation of the state's system of de jure school segregation and the organized undoing of the effects of past segregation. "Beyond [a child's] personal right [under the Fourteenth Amendment] however, or perhaps as an aspect of it, the lower federal courts seem to be recognizing a right in Negro school children, enforceable at least by a class action, *to have the school system administered free of an enforced policy of segregation* irrespective of whether any colored pupil has been denied admission to any particular school on the ground of his race."[65]

It is undoubtedly true that the intangible inadequacies of a segregated education harm the individual, but the Supreme Court treated these inadequacies as inherent attributes which prevail universally.[66] For example, the Court said:

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[64] Note, 20 U. Chi. L. Rev. 577 (1953).

[65] Meador, The Constitution and the Assignment of Pupils to Public Schools, 45 Va. L. Rev. 517, 523 (1959).

[66] In *Brown* the unanimous court, through Chief Justice Warren, cited the Slaughter House Cases, 1872, 83 U.S. (16 Wall.) 36, 71 in which the Court stated: ". . . one pervading purpose found in [all of these amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the Fifteenth Amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth." The Court also quoted the following passage from Strauder v. West Vir-

> [Education] is the very foundation of good citizenship. Today it is a principal instrument in *awakening the child to cultural values*, in preparing him for later professional training, and in *helping him to adjust normally to his environment*. In these days, it is doubtful that any child may reasonably be expected to succeed if he is denied the opportunity of an education. Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on equal terms 347 U.S. at 493. (Emphasis added.)

Again, in a critical passage:

> To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and mind in a way unlikely ever to be undone. 347 U.S. at 494.

With this predicate it is not surprising that *Brown II*, a year after *Brown I* was decided, going beyond recognition of the "*personal*" right in the individual plaintiffs, fashioned a remedy appropriate for the class. The Court imposed on the states the duty of furnishing an integrated school system, that is, the

ginia, 1879, 100 U.S. 303, 307: "The words of the amendment . . . contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."

duty of "effectuat[ing] a transition to a racially nondiscriminatory school *system.*"[67] (Emphasis added.) In addition, *Brown II* subordinated the "*present*" right in the individual plaintiffs to the right of Negroes as a class to a unitary, nonracial system—some time in the future.[68]

The central vice in a formerly de jure segregated public school system is apartheid by dual zoning: in the past by law, the use of one set of attendance zones for white children and another for Negro children, and the compulsory initial assignment of a Negro to the Negro school in his zone. Dual zoning per-

[67] "[T]he courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. . . . To that end the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, *personnel,* revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." Brown v. Board of Education, 349 U.S. 294, 300-01. (Emphasis added.)

[68] "If it is the Negro population as a minority group which is entitled to attend public facilities, then the objective of any corrective plan would be to bring about complete integration of all Negro children in public education." Hartman, The Right to Equal Educational Opportunities as a Personal and Present Right, 9 Wayne L. Rev. 424, 441 (1963). Cf. Greenberg, Race Relations and Group Interests in the Law, 13 Rutgers L. Rev. 503, 506 (1959). There would be no necessary conflict between the individual's "personal and present" right and the class right if the Brown, Cooper v. Aaron, Bradley, and Rogers v. Paul decisions were read as recognizing the immediate right of any Negro plaintiff to transfer to a white school, over and above the state's duty to reorganize its school system. Thus in Watson v. City of Memphis, 1963, 373 U.S. 526, 533, 83 S.Ct. 1314, 10 L.Ed.2d 529, the Supreme Court stated that the rights asserted in that case "are, like all such rights, *present* rights . . . warrants for the here and now and, unless there is an overwhelmingly compelling reason they are to be promptly fulfilled."

sists in the continuing operation of Negro schools identified as Negro, historically and because the faculty and students are Negroes. Acceptance of an individual's application for transfer, therefore, may satisfy that particular individual; it will not satisfy the class. The class is all Negro children in a school district attending, by definition, inherently unequal schools and wearing the badge of slavery separation displays. Relief to the class requires school boards to desegregate the school from which a transferee comes as well as the school to which he goes. It requires conversion of the dual zones into a single system. Faculties, facilities, and activities as well as student bodies must be integrated. No matter what view is taken of the rationale in *Brown I*, *Brown II* envisaged the remedy following the wrong, the state's correcting its discrimination against Negroes as a class, through separate schools, by initiating and operating a unitary integrated school system. The gradual transition the Supreme Court authorized was to allow the states time to solve the administrative problems inherent in that change-over. *No delay would have been necessary if the right at issue in* Brown *had been only the right of individual Negro plaintiffs to admission to a white school. Moreover, the delay of one year in deciding* Brown II *and the gradual remedy* Brown II *fashioned can be justified only on the ground that the "personal and present" right of the individual plaintiffs must yield to the overriding right of Negroes as a class to a completely integrated public education.*

Although psychological harm and lack of educational opportunities to Negroes may exist whether caused by de facto or de jure segregation, a state policy of apartheid aggravates the harm. Thus, Chief Justice Warren quoted with approval the finding of the district court in the *Kansas* case: "The impact [of the detrimental effect of segregation upon Negro children] is greater when it has the sanction of the law; for the policy of separating the race is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive *in a racial[ly] integrated school system.*" (Emphasis added.) *Brown I,* 347 U.S. at 494. The State, therefore, should be under a duty to take whatever corrective action is necessary to undo the harm it created and fostered.[69] "State authorities

[69] "Indeed, the requirement of affirmative action lies at the very heart of Brown; seventeen states had to abandon racial criteria and affirmatively reorganize school attendance plans." Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L.Rev. 564, 612 (1965). See also Gillmor and Gosule, Duty to Integrate Public Schools?. Some Judicial Responses and a Statute, 46 Bost. U. L. Rev. 45, 62-3 (1966). "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the equal protection clause." Cooper v. Aaron, 1958, 358 U.S. 1, 19, 78 S.Ct. 1401, 3 L.Ed.2d 5. ". . . Most of the major decisions of the Warren Court under the equal protection clause impose affirmative obligations upon the states. Earlier cases sustaining a constitutional claim were typically mandates directing the government to refrain from a particular form of regulation. Now the emphasis is upon measures the states must adopt in carrying on their activities and steps they must take [even] to offset disabilities not of their creation". Cox, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 93 (1966).

were thus *duty bound* to devote every effort toward *initiating desegregation* and bringing about the elimination of racial discrimination in the public school *system.*" (Emphasis added.) *Cooper v. Aaron,* 358 U.S. at 7. Some may doubt whether tolerance of de facto segregation is an unsubtle form of state action. There can be no doubt as to the nature and effect of segregation that came into being and persists because of state action as part of the longstanding pattern to narrow the access of Negroes to political power and to the life of the community.

In a school system the persons capable of giving class relief are of course its administrators. It is they who are under the affirmative duty to take corrective action toward the goal of one integrated system. As Judges Sobeloff and Bell said in *Bradley v. School Board of the City of Richmond,* 4 Cir. 1965, 345 F.2d 310, 322:

> "*. . . the initiative in achieving desegregation of the public schools must come from the school authorities. . . . Affirmative action means more than telling those who have long been deprived of freedom of educational opportunity. 'You now have a choice.' . . .* It is now 1965 and high time for the court to insist that good faith compliance requires administrators of schools to proceed actively with *their* nontransferable duty to undo the segregation which both by action and inaction has been persistently perpetuated. (Emphasis added.)

In *Northcross v. Board of Education of the City of Memphis*, 6 Cir. 1962, 302 F.2d 818, the defendants asserted, as the defendants assert here, that continued segregation is "voluntary on the part of Negro pupils and parents because they do not avail themselves of the transfer provisions." The Court held: "The Pupil Assignment Law . . . will not serve as a plan to convert a biracial system into a nonracial system . . . Negro children cannot be required to apply for that to which they are entitled as a matter of right. . . . *The burden rests with the school authorities to initiate desegregation . . . [The Board] should submit some realistic plan for the organization of their schools on a nonracial basis*". (Emphasis added.) In *Dowell v. School Board of Oklahoma City Public Schools*, W. D. Okla. 1965, 244 F. Supp. 971, 975, 978-79, the School Board in Oklahoma City had "superimposed" a geographic zone plan on "already existing residential segregation initiated by law." The court held: A school board must "adopt policies that would increase the percentage of pupils who are obtaining a desegregated education. . . .[The] failure to adopt an affirmative policy is itself a policy, adherence to which, at least in this case, has slowed up . . . the desegregation process. . . . [W]*here the cessation of assignment and transfer policies based solely on race is insufficient to bring about more than token change in the segregated system, the Board must devise affirmative action reasonably purposed to effectuate the desegregation goal.* This conclusion makes no new law."

The position we take in these consolidated cases is that *the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration.* In *Singleton I* the Court touched on the state's duty to integrate:

> "In retrospect, the second Brown opinion clearly imposes on public school authorities the duty to provide an integrated school system. Judge Parker's well-known dictum should be laid to rest. It is inconsistent with Brown and the later development of decisional and statutory law in the area of civil rights." 348 F.2d at 730 n.5.

Three years before *Singleton I* this Court analyzed the problem in *Potts v. Flax,* 5 Cir. 1963, 313 F.2d 284. In that case the Court rejected a school board's contention that a suit brought by two Negro parents was not a class action even though the record contained testimony that one parent was bringing the action only for his own children and not for other Negro children. The Board contended that a court order was not needed because it was willing to admit any Negro child to a white school on demand of any Negro child. Judge Brown, speaking for the Court, said:

> "Properly construed the purpose of the suit was not to achieve specific assignment of specific children to any specific grade or school. The peculiar rights of specific individuals were not in controversy. It was directed at the *system-wide policy* of racial segrega-

tion. It sought obliteration of that policy of system-wide racial discrimination. . . ."[70]

Even before *Potts v. Flax,* in *Bush v. Orleans Parish School Board,* 5 Cir. 1962, 308 F.2d 492, 499, the Court said:

> "In this aspect of [initial] pupil assignment [to segregated schools] the facts present a clear case where there is not only deprivation of the rights of the individuals directly concerned but deprivation of the rights of Negro school children as a class. As a class, and irrespective of any individual's right to be admitted on a non-racial basis to a particular school, Negro children in the public schools have a constitutional right to have the public school system administered free from an administrative policy of segregation."[71]

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[70] The Court also said: "There is at least considerable doubt that relief confined to individual specified Negro children either could be granted or, if granted, could be so limited in its operative effect. By the nature of the controversy, the attack is on the unconstitutional practice of racial discrimination. Once that is found to exist, the Court must order that it be discontinued. Such a decree, of course, might name the successful plaintiff as the party not to be discriminated against. But that decree may not—either expressly or impliedly—affirmatively authorize continued discrimination by reason of race against others. Cf. Shelley v. Kramer, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161. Moreover, to require a school system to admit the specific successful plaintiff Negro child while others, having no such protection, were required to attend schools in a racially segregated system, would be for the court to contribute actively to the *class* discrimination proscribed by Bush v. Orleans Parish School Board, 5 Cir. 1962, 308 F.2d 491, 499, on rehearing 308 F.2d 503; see also Ross v. Dyer, 5 Cir. 1962, 312 F.2d 191." Potts v. Flax, 313 F.2d at 289.

[71] The Court also said: "Geographical districts based on race are a parish-wide system of unconstitutional classification. Of course, it is undoubtedy true that Brown v. Board of Education

See also *Ross v. Dyer*, 5 Cir. 1963, 312 F.2d 191, 194-95; *Augustus v. Board of Public Instruction of Escambia County*, 5 Cir. 1963, 306 F.2d 862, 869; *Holland v. Board of Public Instruction of Palm Beach County*, 5 Cir. 1958, 258 F.2d 730; *Orleans Parish School Board v. Bush*, 5 Cir. 1957, 242 F.2d 156.

Brown was an inevitable, predictable extension of *Sweat v. Painter*, 1950, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114, and *McLaurin v. Oklahoma State Regents*, 1950, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149.[72] Those cases involved separate but equal or identical graduate facilities. Factors "incapable of objective measurement" but crucial to a good graduate education were not available to segregated Negroes. These were the intangible factors that prevented the Negro graduate students from having normal contacts and association wtith white students. Apartheid made the two groups unequal. In *Brown I* these same intangi-

dealt with only an individual child's right to be admitted to a particular school on a non-racial basis. And it is also true, as the second Brown opinion pointed out, that courts must bear in mind the 'personal interest' of the plaintiffs. In this sense, the Brown cases held that the law requires non-discrimination as to the individual, not integration. But when a statute has a statewide discriminatory effect or when a School Board maintains a parish-wide discriminatory policy or system, the discrimination is against Negroes as a class. Here, for example, it is the Orleans Parish dual system of segregated school districts, affecting all school children in the Parish by race, that, first, was a discriminatory classification and, second, established the predicate making it possible for the Pupil Placement Act to fulfill its behind-the-face function of preserving segregation." Bush v. Orleans Parish School Board, 308 F.2d at 499.

[72] See, for example, Ransmier, The Fourteenth Amendment and the "Separate but Equal" Doctrine, 50 Mich. L. Rev. 203, 238-40 (1951); Roche, Education, Segregation and the Supreme Court—A Political Analysis, 99 U. Pa. L. Rev. 949 (1951); Taylor, The Demise of Race Restrictions in Graduate Education, 1 Duke B. Jour. 135 (1951); Note, 26 St. John's L. Rev. 123 (1951).

bles were found "to apply with added force to children in grade and high schools"; educational opportunity in public schools must be made available to all on equal terms.

The *Brown I* finding that segregated schooling causes psychological harm and denies equal educational opportunities should not be construed as the sole basis for the decision.[73] So construed, the way would be open for proponents of the status quo to attempt to show, on the facts, that integration may be harmful or the lesser of two evils. Indeed that narrow view of *Brown I* has led several district courts

[73] Professor Edmund Cahn characterized as a "myth" the notion that the Brown decision was "sociological" rather than "legal". Cahn, Jurisprudence, 31 N.Y.U. L. Rev. 182 (1956); Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150 (1955). "I would not have the constitutional rights of Negroes—or of other Americans—rest on any such flimsy foundation as some of the scientific demonstrations in these records. . . . Heretofore, no government official has contended that he could deny equal protection with impunity unless the complaining parties offered competent proof that they would sustain or had sustained some permanent (psychological or other kind of) damage. The right to equal protection has not been subjected to any such proviso." Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150, 157, 158, 168 (1955). Professor Black has said: "The charge that it is 'sociological' is either a truism or a canard—a truism if it means that the Court, precisely like the *Plessy* court, and like innumerable other courts facing innumerable other issues of law, had to resolve and did resolve a question about social fact; a canard if it means that anything like principal reliance was placed on the formally 'scientific' authorities, which are relegated to a footnote and treated as merely corroboratory of common sense." Black, The Lawfulness of the Segregation Decision, 69 Yale L.J. 421, 430 n.25 (1960).

Acceptance of these views is not inconsistent with the continued vitality of the psychological findings in *Brown I*. Indeed, several studies have reinforced those findings. The most recent is the United States Office of Education's "Equality of Educational Opportunity", the two-year study authorized by section 402 of the Civil Rights Act of 1964 to investigate "the lack of availability of equal educational opportunities for individuals by reason of race, color, religion, or national origin in public educational institutions . . . ." 42 U.S.C. § 2000c—1.

into error.[74] We think that the judgment "must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed."[75] The relief *Brown II* requires rests on recognition of the principle that state-imposed separation by race is an invidious classification and for that reason alone is unconstitutional.[76] Classifications based upon race are especially suspect, since they are "odius to a free people".[77] In short, compulsory separation, apartheid, is per se discriminatory against Negroes.

A number of post-*Brown* per curiam decisions not involving education make it clear that the broad dimensions of the rationale are not circumscribed by the necessity of showing *harmful* inequality to the

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[74] See Stell v. Savannah-Chatham County Board of Education, S.D.Ga. 1963, 220 F. Supp. 667, rev'd 333 F.2d 55; 255 F.Supp. 84 (1965), appeal pending; 225 F.Supp. 88 (1966), appeal pending. See also Jackson Municipal Separate School District v. Evers, 5 Cir. 1966, 357 F.2d 653.

[75] Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 33 (1959). Professor Wechsler concluded: "For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate . . ." The article started a vigorous debate. See authorities collected in Emmerson and Huber, Political and Civil Rights 1625-1629 (1967). See also Kaplan, Equality in an Unequal World, 61 NW U.L. Rev. 363 (1966).

For discussion of the inherently—arbitrary—classification principle against the principle of equality of educational opportunity, see Fiss, Racial Imbalance in the Public Schools: The Constitutional Concept, 78 Harv. L. Rev. 564, 590-98 (1965).

[76] See Pollak, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1 (1959); Kaplan, Segregation Litigation and the Schools—Part I, The New Rochelle Experience 58 NW U. L. Rev. 1, 21 (1964).

[77] Korematsu v. United States, 1944, 323 U. S. 214, 216, 65 S. Ct. 193, 89 L. Ed. 194.

individual. In these cases Negroes were separated from whites but were afforded equal or identical facilities. Relying on *Brown,* the Court ordered integration of the facility or activity.[78] See also *Anderson v. Martin,* 1964, 375 U.S. 399, 402, 84 S.Ct. 454, 11 L.Ed.2d 430, 433, holding that compulsory designation of a candidate's race on the ballot is unlawful. The designation placed "the power of the State behind a racial classification that induces racial prejudice at the polls."

Bolling v. Sharpe, 1954, 347 U.S. 497, 74 S.Ct. 693, 98 L. Ed. 884, provides further evidence of the breadth of the right recognized in *Brown.* There, because the case concerned the District of Columbia, the Court had to rely on the due process clause of the Fifth Amendment instead of the equal protection clause of the Fourteenth Amendment. Going beyond any question of psychological harm or of the denial of equal educational opportunities to the individual, the Court concluded that racial classifications in public education are so unreasonable and arbitrary as to violate due process:[79]

[78] E.g., Schiro v. Bynum, 375 U.S. 395 (1964) (municipal auditoriums); Johnson v. Virginia, 373 U.S. 61 (1963) (court-rooms); State Athletic Comm'n v. Dorsey, 395 U.S. 533 (1959) (athletic contests); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (public parks and golf courses); Gayle v. Browder, 352 U.S. 903 (intrastate busses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses). Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (municipal amphitheater). For lower court decisions to the same effect, see cases collected in Emmerson and Huber, Political and Civil Rights in the United States 1678 (1967).

[79] See Cahn, Jurisprudence, 30 N.Y.U.L. Rev. 150, 155 (1955). Cf. Antieau, Equal Protection Outside the Clause, 40 Cal. L. Rev. 362, 364 (1954); Pollak, Racial Discrimination and Judicial Integrity, 108 U. Pa. L. Rev. 1, 27-28 (1959).

> "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. *Segregation in public education is not reasonably related to any proper governmental objective,* and thus it imposes on Negro children . . . a burden that constitutes an arbitrary deprivation of their liberty." 347 U. S. at 498. (Emphasis added.)

As in the jury exclusion cases, when the classification is not "reasonably related to any proper governmental objective" equal protection and due process merge.

If *Brown* has only the narrow meaning *Briggs* gives it, the system of state-sanctioned segregated schools will continue indefinitely with only a little token desegregation. White school boards, almost universal in this circuit, will be able to continue to say that their constitutional duty ends when they provide relief to the particular Negro children who, as individuals, claim their personal right to be admitted to white schools. If the *Briggs* thinking should prevail, the dual system will, for all practical purposes, be maintained: white school officials in most key positions at the state and county levels; Negro faculties in Negro schools, white faculties in white schools; no white children or only a few white children of way-out parents in Negro schools; a few Negroes in some white schools; at best, tokenism in certain school districts.

Brown's broad meaning, its important meaning, is its revitalization of the national constitutional right the Thirteenth, Fourteenth, and Fifteenth Amendments created in favor of Negroes. This is the right of Negroes to *national* citizenship, their right as a class to share the privileges and immunities only white citizens had enjoyed as a class. *Brown* erased *Dred Scott,* used the Fourteenth Amendment to breathe life into the Thirteenth, and wrote the Declaration of Independence into the Constitution. Freedmen are free men. They are created as equal as are all other American citizens and with the same unalienable rights to life, liberty, and the pursuit of happiness. No longer "beings of an inferior race"—the *Dred Scott* article of faith—Negroes too are part of "the people of the United States".

A primary responsibility of federal courts is to protect nationally created constitutional rights. A duty of the States is to give effect to such rights—here, by providing equal educational opportunities free of any compulsion that Negroes wear a badge of slavery. The States owe this duty to Negroes, not just because every citizen is entitled to be free from arbitrary discrimination as a heritage of the common law or because every citizen may look to his state for equal protection of the rights a state grants its citizens. As Justice Harlan clearly saw in the *Civil Rights Cases* (1883), 109 U. S. 3, 3 S.Ct. 18, 27 L.Ed. 835, *the Wartime Amendments created an affirmative duty that the States eradicate all relics, "badges and indicia of slavery" lest Negroes as a race sink back into "second-class" citizenship.*

B. The factual situation dealt with in *Bell v. School City of Gary,* N. D. Ind. 1963, 213 F. Supp. 819, *aff'd* 7 Cir. 1963, 324 F.2d 209, *cert. den'd* 377 U. S. 924 (1964) is not the situation the Supreme Court had before it in *Brown* or that we deal with in this circuit. *Brown* dealt with state-imposed segregation based on dual attendance zones. *Bell* involved nonracially motivated de facto segregation in a school system based on the neighborhood single zone system. In *Bell* the plaintiffs alleged that the Gary School Board had deliberately gerrymandered school attendance zones to achieve a segregated school system in violation of its "duty to provide and maintain a racially integrated system". On the showing that the students were assigned and boundary lines drawn based upon reasonable nonracial criteria, the court held that the school board did not deliberately segregate the races; the racial balance was attributable to geographic and housing patterns. The court analyzed the problem in terms of state action rather than in terms of the Negroes' right to equal educational opportunities. Finding no state action the court concluded that *Brown* did not apply. In effect, the court held that de facto segregated neighborhood schools must be accepted. At any rate, the court said, "states do not have an affirmative duty to provide an integrated education". The Seventh Circuit affirmed.

We must assume that Congress was well aware of the fact that *Bell* was concerned with de facto segregated neighborhood schools—only. Notwithstanding the broad language of the opinion relating to the

lack of a duty to integrate, language later frequently quoted by Senator Humphrey and others in the debates on the Civil Rights Act of 1964, Congress went only so far as to prohibit cross-district bussing and cross-district assignment of students.

The facts, as found by the Court in *Bell,* favored the Gary School Board. Other courts, on very similar facts, have decided that there are alternatives to acceptance of the status quo.[80] A commentator on the subject has fairly summed up the cases: "Using *Brown* as a governing principle, racial imbalance caused by racially motivated conduct is clearly invalid. When racial imbalance results fortuitously, there is a split of authority."[81]

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[80] "The central constitutional fact is the inadequacy of segregated education. . . . The educational system that is thus compulsory and public afforded must deal with the inadequacy arising from adventitious segregation; it cannot accept and indurate segregation on the ground that it is not coerced or planned but accepted." Branche v. Board of Education, 204 F.Supp. at 153. See Wright, Public School Desegregation: Legal Remedies for De Facto Segregation, 40 N.Y.U.L. Rev. 285, 301 (1965); Fiss, 78 Harv. L. Rev. 564, 609 (1965) (a relative approach); Sedler, School Segregation in the North and West: Legal Aspects, 7 St. Louis L. Rev. 228, 233-239, 275 (1963); Maslow, De Facto Public School Segregation, 6 Vill. L. Rev. 353 (1961).

[81] King, Racial Imbalance in the Public Schools, 18 Vand. L. Rev. 1290, 1337 (1965). Webb v. Board of Education of Chicago, N.D.Ill. 1963, 223 F.Supp. 466; Deal v. Cincinnati Board of Education, S.D.Ohio 1965, 244 F.Supp. 572; Lynch v. Kenston School District, N.D.Ohio 1964, 229 F.Supp. 740; Downs v. Board of Education, 10 Cir. 1965, 336 F.2d 988, cert. denied 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed. 2d 800; and Sealy v. Department of Public Instruction of Pennsylvania, 3 Cir. 1958, 252 F.2d 898, are more or less in agreement with *Bell.* These cases usually rely on the school board's good faith, lack of racial motivation, and the propriety of considering transportation, geography, safety, access roads, and other neutral criteria as rational bases for school districting. Taking the contrary position are: Booker v. Board of Education of Plainfield, 1965, 45 N.J. 161, 212 A.2d 1; Branche v. Hempstead, E.D.N.Y. 1962, 204 F.Supp. 150; Blocker v. Board of Education of Manhasset, E.D.N.Y. 1964, 226 F. Supp. 208, 229 F.Supp. 709; Barksdale v. Springfield School Committee, D.Mass. 1965, 237

Barksdale v. Springfield School Committee, D. Mass. 1965, 237 F. Supp. 543, similar on the facts to *Bell*, holds squarely contrary to *Bell*:

> "The defendants argue, nevertheless, that there is no constitutional mandate to remedy racial imbalance. Bell v. School City of Gary, 324 F.2d 209 (7th Cir. 1963). But that is not the question. *The question is whether there is a constitutional duty to provide equal educational opportunities for all children within the system.* While Brown answered that question affirmatively in the context of coerced segregation, the constitutional fact—the inadequacy of segregated education—is the same in this case, and I so find. . . . *This is not to imply that the neighborhood school policy per se is unconstitutional, but that it must be abandoned or modified when it results in segregation in fact.*

F.Supp. 543, vacated for other reasons 1 Cir. 1965, 348 F.2d 261; Jackson v. Pasadena City School District, 1962, 59 Cal. 2d 876, 31 Cal. Rept. 606, 382 P.2d 878. School authorities may act to offset racial imbalance: See Addabbo v. Donovan, 256 N.Y.S. 2d 178, aff'd 261 N.Y.S.2d 68, 209 N.E.2d 112 (1965), *cert. den'd* 382 U.S. 905 (1965). See also Balaban v. Rubin, 248 N.Y.S.2d 574, aff'd 250 N.Y.2d 281, 199 N.E.2d 375 (1964), *cert. den'd* 379 U.S. 881 (1964) (Board may "take into consideration the ethnic composition of the children" before drawing the attendance lines for a new school); Olson v. Board of Education, E.D.N.Y. 1966, 250 F. Supp. 1000 (the Princeton plan—see note 124, infra); Offerman v. Nitkowski, W.D. N.Y. 1965, 248 F.Supp. 129; Guida v. Board of Education of New Haven, 26 Conn. Supp. 121, 213 A.2d 843 (1965); Strippoli v. Bichal, 250 N.Y.S.2d 969, aff'd N.Y.S.2d 84, 209 N.E.2d 123 (1965) (bussing); Morean v. Board of Education, 42 N.J. 237, 200 A.2d 97 (1965); Vetere v. Allen, 258 N.Y. 77, 206 N.E. 2d 174 (1965) (redistricting of attendance zone approved because "racial balance is essential to a sound education"); Van Blerkom v. Donovan, 1965, 15 N.Y.2d 399, 259 N.Y.S.2d 825, 207 N.E.2d 503.

> . . . I cannot accept the view in *Bell* that only forced segregation is incompatible with the requirements of the Fourteenth Amendment, *nor do I find meaningful the statement that '[t]he Constitution . . . does not require integration. It merely forbids discrimination.'* 324 F.2d at 213. . . . ¶ This court recognizes and reiterates that the problem of racial concentration is an educational, as well as constitutional, problem and, therefore, orders the defendants to present a plan no later than April 30, 1965, *to eliminate to the fullest extent possible* racial concentration in its elementary and junior high schools within the framework of effective educational procedures, as guaranteed by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States." (Emphasis added.)

"In short, *Barksdale* [does not analyze *Brown*] in terms of propriety of school board action, but proceeds in terms of a right on the part of Negro students to an equal educational opportunity, which in light of the ruling in *Brown* that separate schools are inherently unequal, must perforce be a right to an integrated educational setting."[82] On appeal, the First Circuit accepted the district court's findings of fact but vacated the order with directions to dismiss without prejudice because the school board, on its own

[82] Gillmor and Gosule, Duty to Integrate Public Schools? Some Judicial Responses and a Statute, 46 Bost. U. L. Rev. 45, 57 (1966).

initiative, had taken action identical with the court-ordered action. 348 F.2d 261. The Court noted a difference between "the seeming absolutism" of the opinion and the less sweeping order "to eliminate [segregation] to the fullest extent possible . . . within the framework of effective educational procedures".[83] Taking both opinions together, they recognize that "the state would not be permitted to ignore the problem of de facto segregation. The holding in *Brown,* unexplained by its underlying reasoning, requires no more than the decision in *Bell*, but when illuminated by the reasoning, it permits the result in *Barksdale* and may require that result."[84] At the very least, as the *Barksdale* court saw it, there is a duty to integrate in the sense that integration is an educational goal to be given a high, high priority among the various considerations involved in the proper administration of a system beset with de facto segregated schools.

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[83] The First Circuit construed the court's order as not calling for "an absolute right in the plaintiffs to have what the court found to be 'tantamount to segregation' removed at all costs." At the same time, the Court said: "Rather we take it to determine that . . . racial imbalance disadvantages Negro students and impairs their educational opportunities as compared with other races to such a degree that they have a right to insist that the defendants consider their special problems along with all other relevant factors when making relevant decisions." Springfield School Committee v. Barksdale, 1965, 348 F.2d 261, 264.

[84] Gillmor and Gosule supra note 82, at 64. Compare the statement of policy in the Massachusetts statute, An Act Providing for the Elimination of Racial Imbalance in the Public Schools (Mass. Acts. 1965, ch. 651):

> It is hereby declared to be the policy of the commonwealth to encourage all school committees to adopt as educational objectives the promotion of racial balance and the correction of existing racial imbalance in the public schools. The prevention or elimination of racial imbalance shall be an objective in all decisions involving the drawing or altering of school attendance lines and the selection of new school sites.

The statute was enacted a month after *Barksdale* was decided.

Although *Brown* points toward the existence of a duty to integrate de facto segregated schools,[85] the holding in *Brown*, unlike the holding in *Bell* but like the holdings in this circuit, occurred within the context of state-coerced segregation. The similarity of pseudo de facto segregation in the South to actual de facto segregation in the North is more apparent than real. Here school boards, utilizing the dual zoning system, assigned Negro teachers to Negro schools and selected Negro neighborhoods as suitable areas in which to locate Negro schools. Of course the concentration of Negroes increased in the neighborhood of the school. Cause and effect came together. In this circuit, therefore, the location of Negro schools with Negro faculties in Negro neighborhoods and white schools in white neighborhoods cannot be described as an unfortunate fortuity: It came into existence as state action and continues to exist as racial gerrymandering, made possible by the dual system.[86] Segregation resulting from racially motivated gerryman-

[85] "Some of the Supreme Court's language in *Brown* can apply to this type of segregation as well as to that before the Court, since this type of imbalance may also 'generate a feeling of inferiority as to [the Negro children's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone.' Thus, if one believes that the basis of the *Brown* decision was the Court's finding that separate schools were unconstitutional simply because they bred a feeling of inferiority in the Negro, one must also believe that the neighborhood school must also be unconstitutional if it breeds the same feeling of inferiority." Kaplan, Segregation Litigation and the Schools—Part 1, The New Rochelle Experience 58 NW U. L. Rev. 1, 21 (1964). "Necessarily implied in [Brown's] . . . proscription of segregated education was the positive duty of eliminating it." Taylor v. Board of Education of the City of New Rochelle, S.D.N.Y. 1961, 191 F. Supp. 181, 193, aff'd 294 F.2d 36, *cert. denied* 368 U.S. 940.

[86] See Clemons v. Board of Education of Hillsboro, 6 Cir. 1956, 228 F.2d 853, cert. den'd 350 U.S. 1000 (1956). Cf. Gomillion v. Lightfoot, 1960, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110.

dering is properly characterized as "de jure" segregation. See *Taylor v. Board of Education of the City of New Rochelle,* S.D.N.Y. 1961, 191 F. Supp. 181.[87] The courts have had the power to deal with this situation since *Brown I.* In *Holland v. Board of Public Instruction of Palm Beach County,* 5 Cir. 1958, 258 F.2d 730, although there was no evidence of gerrymandering as such, the court found that the board "maintained and enforced" a completely segregated system by using the neighborhood plan to take advantage of racial residential patterns. See also *Evans v. Buchanan,* D.Del. 1962, 207 F. Supp. 820, where, in spite of a genuflexion in the direction of *Briggs,* the Court found that there was gerrymandering of school districts superimposed on a pre-*Brown* policy of segregation.

C. The defendants err in their contention that the HEW and the courts cannot take race into consideration in establishing standards for desegregation "The Constitution is not this color-blind."[88]

The Constitution is both color blind and color conscious. To avoid conflict with the equal protection

[87] Modified plan approved, 195 F.Supp. 231, *aff'd* 2 Cir. 1961, 294 F.2d 36, cert. den'd 368 U.S. 940 (1961). See Kaplan, Segregation Litigation and the Schools—Part 1; The New Rochelle Experience, 58 NW.U. L. Rev. 1 (1964). Jackson v. School Board of the City of Lynchburg, W.D. Va. 1962, 203 F.Supp. 701; Dowell v. School Board of Oklahoma City Public Schools, W.D. Okla. 1965, 244 F.Supp. 971; and Swann v. Charlotte-Mecklenburg Board of Education, W.D.N.C. 1965, 243 F.Supp. 667, followed *Taylor* on the unconstitutionality of racial gerrymandering. See also Jackson v. Pasadena City School District, 1963, 59 Cal.2d 876, 382 P.2d 878; Clemons v. Board of Education of Hillsboro, 6 Cir. 1956, 228 F.2d 853, *cert. den'd* 350 U.S. 106 (1956); Fuller v. Volk, 3 Cir. 1965, 351 F.2d 323.

[88] Taylor v. Board of Education of the City of New Rochelle, S.D.N.Y. 1961, 191 F.Supp. 181, 196, *aff'd* 294 F.2d 36 (Kaufman, J.).

clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose. For example, jury venires must represent a cross-section of the community. *Strauder v. West Virginia*, 1880, 100 U.S. 303, 25 L.Ed. 664. The jury commissioners therefore must have a "conscious awareness of race in extinguishing racial discrimination in jury service". *Brooks v. Beto,* 5 Cir. 1966, 366 F.2d 1. Similarly, in voter registration cases we have used the "freezing principle" to justify enjoining the use of a constitutional statute where, in effect, the statute would perpetuate past racial discrimination against Negroes. *United States v. Louisiana,* E.D. La. 1963, 225 F.Supp. 353, aff'd 1965, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 817. "[I]t is unrealistic to suppose that the evils of decades of flagrant race discrimination can be overcome by purging registration rolls of white voters. . . . [U]nless there is some appropriate way to equalize the present with the past, the injunctive prohibitions even in the most stringent, emphatic, mandatory terms prohibiting discrimination in the future, continues for many years a structure committing effectual political power to the already registered whites while excluding Negroes from this vital activity of citizenship." *United States v. Ward,* 5 Cir. 1965, 349 F.2d 795, 802. "An appropriate remedy . . . should undo the results of past discrimination as well

as prevent future inequality of treatment." *United States v. Duke,* 5 Cir. 1964, 332 F.2d 759, 768. If the Constitution were absolutely color-blind, consideration of race in the census and in adoption proceedings would be unconstitutional.

Here race is relevant,[89] because the governmental purpose is to offer Negroes equal educational opportunities. The means to that end, such as disestablishing segregation among students, distributing the better teachers equitably, equalizing facilities, selecting appropriate locations for schools, and avoiding resegregation must necessarily be based on race. School officials have to know the racial composition of their school populations and the racial distribution within the school district. The Courts and HEW cannot measure officials' good faith or progress without taking race into account. "When racial imbalance infects a public school system, there is simply no way to alleviate it without consideration of race. . . . There is no constitutional right to have an inequality

[89] "The justification for the school board's incorporation of racial distinctions in its correctional scheme is that race is a relevant characteristic, given the school board's purpose, which is to avoid psychological injury to the Negro child, break down social barriers, and mitigate the academic inadequacy of the imbalanced schools. Of course, it might be argued that many of the evils the school board attempts to eliminate when it takes correctional steps are not attributable to the race of the individuals within the imbalanced school, but instead are attributable to their social class. Yet, certain of these evils are uniquely related to the fact that the imbalance is a racial one; namely, those attributable to the personal impact of the imbalance on the Negro. Moreover, most Negroes in the ghetto, and hence attending an imbalanced school, are members of the lowest economic class, and thus the board's remedial measures will tend to cure the social imbalance as well." Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564, 577-78 (1965).

perpetuated."[90] Judge Sobeloff's answer in *Wanner v. County School Board of Arlington County,* 4 Cir. 1966, 357 F.2d 452, 454-55, is our answer in this case:

> "If a school board is constitutionally forbidden to institute a system of racial segregation by the use of artificial boundary lines, it is likewise forbidden to perpetuate a system that has been so instituted. It would be stultifying to hold that a board may not move to undo arrangements artificially contrived to effect or maintain segregation, on the ground that this interference with the status quo would involve 'consideration of race.' When school authorities, recognizing the historic fact that existing conditions are based on a design to segregate the races, act to undo these illegal conditions—especially conditions that have been judicially condemned—their effort is not to be frustrated on the ground that race is not a permissible consideration. This is not the 'consideration of race' which the Constitution discountenances. . . . There is no legally protected vested interest in segregation. If there were, then Brown v. Board of Education and the numerous decisions based on that case would be pointless. Courts will not say in one breath that public school systems may not practice segregation, and in the next that they may do nothing to eliminate it."

[90] Wright, Public School Desegregation: Legal Remedies for De Facto Segregation, 16 West. Res. L. Rev. 478, 489 (1965).

D. Under *Briggs's* blessing, school boards throughout this circuit first declined to take any affirmative action that might be considered a move toward integration. Later, they embraced the Pupil Placement Laws as likely to lead to no more than a little token desegregation. Now they turn to freedom of choice plans supervised by the district courts. As the defendants construe and administer these plans, without the aid of HEW standards there is little prospect of the plans' ever undoing past discrimination or of coming close to the goal of equal educational opportunities. Moreover, freedom of choice, as now adminstered, necessarily promotes resegregation. The only relief approaching adequacy is the conversion of the still-functioning dual system to a unitary, non-racial system—lock, stock, and barrel.

If this process be "integration" according to the 1955 *Briggs* court, so be it. In 1966 this remedy is the relief commanded by *Brown,* the Constitution, the Past, the Present, and the wavy fore-image of the Future.

IV.

We turn now to the specific provisions of the Civil Rights Act on which the defendants rely to show that HEW violates the Congressional intent. These provisions are the amendments to Title IV and VI added in the Senate. The legislative history of these amend-

ments is sparse and less authoritative than usual because of the lack of committee reports on the amended version of the bill.

A. Section 401(b) defines desegregation:

> " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

The affirmative portion of this definition, down to the "but" clause, describes the assignment provision necessary in a plan for conversion of a de jure dual system to a unitary, integrated system. The negative portion, starting with "but", excludes assignment to overcome racial imbalance, that is, acts to overcome de facto segregation. As used in the Act, therefore, "desegregation" refers only to the disestablishment of segregation in de jure segregated schools. Even if a broader meaning should be given to "assignment . . . to overcome racial imbalance", Section 401 would not mean that such assignments are unlawful:

> "The intent of the statute is that no funds and no technical assistance will be given by the United States Commissioner of Education with respect to plans for the assignment of students to public schools in order to over-

come racial imbalance. The statute may not be interpreted to mean that such assignment is illegal or that reasonable integration efforts are arbitrary or unlawful."[91]

The prohibition against assignment of students to overcome racial imbalance was added as an amendment during the debates in the House to achieve the same result as the anti-bussing provision in section 407. Some of the difficulty in understanding the Act and its legislative history arises from the statute's use of the undefined term "racial imbalance". It is clear however from the hearings and debates that Congress equated the term, as do the commentators, with "de facto segregation" that is, non-racially motivated segregation in a school system based on a single neighborhood school for all children in a definable area.[92] Thus, Congressman William Cramer

[91] Addabbo v. Donovan, 22 App. Div.2d 383, 256 N.Y.S.2d 178, 184, (2d Dept. 1965), aff'd, 16 N.Y.2d 619, 261 N.Y.S.2d 68, 209 N.E.2d 112 (1965), cert. denied, 382 U.S. 905 (1965).

[92] For example, "Racial imbalance" and "de facto segregation" are "used synonymously . . . [to] refer to a situation where a school is predominantly composed of Negro students not as a result of state action but rather as the end product of segregated housing and adherence to the neighborhood school plan." Gillmor and Gosule, 46 Boston U. L. Rev. 45, 46 (1966). The term "de facto segregation" has become accepted as denoting non-racially motivated separation of the races as opposed to "de jure segregation" denoting deliberate separation of the races by law. Since segregation is unconstitutional, each is a contradiction in terms. One student of the problem has pointed out, "The term *de facto* segregation makes the racially imbalanced school appear . . . [to be] the Northern counterpart of segregated education under Jim Crow laws . . . . As such the term distorts reality and paralyzes thought. [Racial] imbalance is frequently labeled 'de facto' segregation to suggest that the requisite governmental involvement cannot be found." Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564, 566, 584 (1965). Another has said, "As a more accurate term, racial im-

who offered the amendment, was concerned that the bill as originally proposed might authorize the government to require bussing to overcome de facto segregation. In explaining the amendment, he said:

> "In the hearings before the committee I raised questions on 'racial imbalance' and in the sub-committee we had lengthy discussions in reference to having these words stricken in the title, as it then consisted, and to strike out the words *'racial imbalance'* proposed by the administration. ¶ The purpose is *to prevent any semblance of congressional acceptance or approval of the concept of 'de facto' segregation* or to include in the definition of 'desegregation' *any balancing of school attendance by moving students across school district lines to level off percentages where one race outweighs another.*"

The neighborhood school system is rooted deeply in American culture.[93] Whether its continued use is

balance will be used to denote fortuitous racial separation in the public schools". King, Racial Imbalance in the Public Schools: Constitutional Dimensions and Judicial Response, 18 Vand. L. Rev. 1290, 1291 (1965).

"*De facto* segregation has become the short way of describing the existing situation in northern cities. . . . a school system which is marked by a very high proportion of Negroes in some of its schools, and few or none in others, but in which this separation has taken place without the compulsion of a state law or officially announced policy requiring that Negro and white children be placed in separate schools." Hyman and Newhouse, Desegregation of the Schools: The Present Legal Situation, 14 Buff. L. Rev. 208, 221 (1964). See also Carter, De Facto Segregation, 16 West. Res. L. Rev. 502, 503 (1965).

[93] The rationale of the neighborhood school system is that the school serves as the educational, recreational, and cultural center of the community. See Hansen, The Role of Educators, 34 Notre Dame L. Rev. 652, 654 (1959). Proponents of the view that neighborhood schools may become so racially imbalanced as to

constitutional when it leads to grossly imbalanced schools is a question some day to be answered by the Supreme Court, but that question is not present in any of the cases before this Court. As noted in the previous section of this opinion, we have many instances of a heavy concentration of Negroes or whites in certain areas, but always that type of imbalance has been superimposed on total school separation. And always the separation originally was racially motivated and sanctioned by law in a system based on two schools within a neighborhood or overlapping neighborhoods, each school serving a different race. The situations have some similarity but they have different origins, create different problems, and require different corrective action.[94]

In the 1964 Act (and again in 1966 during consideration of amendments to the Elementary and Secondary Education Act of 1965) Congress, within the con-

require affirmative corrective action point out: "The modern-day neighborhood school cannot be equated with the common school of yesteryear—the latter constitutes America's ideal of a democratic institution—a single structure serving a heterogeneous community in which children of varied racial, cultural, religious, and socio-economic backgrounds were taught together—the proverbial melting pot. Because of rigid racial and socio-economic stratification, ethnic and class similarity has become the most salient present-day neighborhood characteristic, particularly in urban areas. The neighborhood school, which encompasses a homogeneous racial and socio-economic grouping, as is true today, is the very antithesis of the common school heritage." Carter, De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented, 16 West. Res. L. Rev. 502, 507 (1965). See also Sedler, School Segregation in the North and West: Legal Aspects, 7 St. Louis U. L. J. 228, 252-56 (1963).

[94] For some idea of the number and complexity of the administrative problems school officials face in dealing with de facto segregation, see Kaplan, Segregation Litigation and the Schools—Part II: The General Northern Problem, 58 NW. U. L. Rev. 157, 182-186 (1963). Professor Kaplan quotes at length excerpts from the testimony in *Bell*.

text of debates on aid to de facto segregated schools declined to decide just what should be done about imbalanced neighborhood schools.[94a] The legislative solution, if there is one to this problem, will require a carefully conceived and thoroughly debated comprehensive statute. In the 1964 Act Congress simply directed that the federal assistance provided in Title IV, §403-5 was not to be used for developing plans to assign pupils to overcome racial imbalance.[95] Similarly, Congress withheld authorizing the Attorney General, in school desegregation actions, to ask for a court order calling for bussing pupils from one school to another to "achieve a racial balance".[96]

[94a] The question of providing special, ear-marked federal funds for school districts that were trying to correct imbalanced neighborhood schools came up again in connection with the 1966 amendments to the Elementary and Secondary Education Act of 1965. The House committee recommended special priority for applications under Title III of the Act from local school districts which sought help with problems of overcrowding, obsolescence, or racial imbalance. The House withdrew priority for dealing with problems of racial imbalance and added an amendment to Section 604 of the Act to the effect that nothing in the Act be construed to "require the assignment or transportation of students or teachers in order to overcome racial imbalance." The Senate went along with both actions. The debate makes clear that Congress was once again talking about racial imbalance in the context of de facto, not de jure, school segregation. See particularly Congressional Record, October 6, 1966, pp. 24538-9; 24541-3. See also 1966 U.S. Code Congressional and Administrative News, No. 11, pp. 5089-90, for language in House committee report recommending the priority position of applications to deal with racial imbalance.

[95] Congressman Cramer's amendment.

[96] This restriction appears in §407 of the Act. In its context it seems clearly to restrict the Attorney General to requesting only such relief as is constitutionally compelled. In other words, the Act is *not* to be construed as authorizing a statutory duty to reduce imbalance by bussing. Certainly the language of §407 does not call for a construction that prohibits a court order directing that school boards abandon racially discriminatory practices which violate the Constitution. Nor does it suggest that the Attorney General is precluded from requesting court orders to end racial imbalance resulting from unconstitutional practices.

B. Section 407(a)(2) of Title IV authorizing the Attorney General to file suit to desegregate, contains the "anti-bussing" proviso:

> ". . . nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial compliance with constitutional standards."

First, it should be noted that the prohibition applies only to transportation; and only to transportation across school lines to achieve racial balance. The furnishing of transportation as part of a freedom of choice plan is not prohibited. Second, the equitable powers of the courts exist independently of the Civil Rights Act of 1964. It is not contended in the instant cases that the Act conferred new authority on the courts. And this Court has not looked to the Act as a grant of new judicial authority.

Section 407(a)(2) might be read as applying only to orders issued in suits filed by the Attorney General under Title IV. However, Senator, now Vice President Humphrey, Floor Manager in the Senate, said it was his understanding that the provision applied to the entire bill. In particular, he said that it applies to any refusal or termination of federal assistance under Title VI since the procedure for doing so requires an order approved by the President. Senator Humphrey explained:

> "This addition seeks simply to *preclude an inference that the title confers new authority to deal with 'racial imbalance' in schools,* and should serve to soothe fears that Title IV might be read to empower the Federal Government to order the bussing of children around a city in order to achieve a certain racial balance or mix in schools. ¶ Furthermore, a new section 410 would explicitly declare that 'nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.' ¶ Thus, classification along *bona fide neighborhood school lines,* or *for any other legitimate reason* which local school boards might see fit to adopt, would not be affected by Title IV, so long as such classification was bona fide. Furthermore, this amendment makes clear that the only Federal intervention in local schools will be for the purpose of preventing denial of equal protection of the laws." (Emphasis added.)

Senator Humphrey spoke several times in the language of *Briggs* but his references to *Bell* indicate that the restrictions in the Act were pointed at the Gary, Indiana de facto type of segregation. Senator Byrd (West Virginia) asked Senator Humphrey would he give assurance "that under Title VI school children may not be bussed from one end of the community to another end of the community at taxpayers' expense to relieve so-called racial imbalance in the schools". Senator Humphrey replied:

> "I do . . . That language is to be found in Title IV. The provision [§407(a)(2)] merely quotes the substance of a recent court decision which I have with me, and which I desire to include in the Record today, the so-called Gary case."

Senator Humphrey explained:

> "Judge Beamer's opinion in the *Gary* case is significant in this connection. In discussing this case, as we did many times, it was decided to write the *thrust of the court's opinion* into the proposed substitute." (Emphasis added.)

The thrust of the *Gary* case (*Bell*) was that if school districts were drawn without regard to race, but rather on the basis of such factors as density of population, travel distances, safety of the children, costs of operating the school system, and convenience to parents and children, those districts are valid even if there is a racial imbalance caused by discriminatory practices in housing. Thus, continuing his explanation, Senator Humphrey said:

> "The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the schools. The natural factors, such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, *if the school districts are not gerrymandered, and in effect*

> *deliberately segregated.* The fact that there is a racial imbalance per se is not something which is unconstitutional. That is why we have attempted to clarify it with the language of Section 4." (Emphasis added.)

C. Section 601 states the general purpose of Title VI of the Act:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, *be denied the benefits of,* or be subjected to discrimination under any program or activity receiving Federal financial assistance." (Emphasis added.)

This is a clear congressional statement that racial discrimination against the beneficiaries of federal assistance is unlawful. Children attending schools which receive federal assistance are of course among the beneficiaries. In the House, Congressman Celler explained:

> "The legality is based on the general power of Congress to apply reasonable conditions. . . ¶In general, it seems rather anomalous that the Federal Government should aid and abet discrimination on the basis of race, color or national origin by granting money and other kinds of financial aid. It seems rather shocking, moreover, that while we have on the one hand the 14th amendment, which is supposed to do away with discrimination since it pro-

vides for equal protection of the laws, on the other hand, we have the Federal Government aiding and abetting those who persist in practicing racial discrimination."

In the Senate, Senator Javits, an assistant floor-manager, expressed concern as to the clarity of the statement of policy:

> "I ask the Senator whether we now have a clear understanding that if title VI shall be enacted as it is now proposed, the express and clear policy of Congress against aiding discrimination will prevail . . ."

Senator Humphrey answered:

> "Some Federal agencies appear to have been reluctant to act in this area. Title VI will require them to act. Its enactment will thus serve to insure uniformity and permanence to the nondiscrimination policy."

D. Section 604 of the Act, 42 U.S.C. § 2000d—3 is the section the defendants principally rely upon and the section most misunderstood.[97] It provides:

> "Nothing contained in this title shall be construed to authorize action under this title by any department or agency *with respect to any employment practice of any employer* employment agency, or labor organization ex-

[97] See Hearings Before the Committee on Rules, House of Representatives, 89 Cong. 2nd Sess., on H. Rep., 826, Sept. 29-30, 1966, 24-26, 37-40.

cept where a primary objective of the Federal financial assistance is to provide employment." (Emphasis added.)

The defendants contend that this section bars any action requiring desegregation of faculties and school personnel.

Section 604 was not a part of the original House bill. Senator Humphrey, while introducing the Act explained: "[The] Commissioner might also be justified in requiring elimination of racial discrimination in employment or assignment of teachers, at least where such discrimination affected the educational opportunities of students. See *Braxton v. Board of Public Instruction of Duval County,* 5 Cir. 1964, 326 F.2d 616." 110 Cong.Rec. p. 6345. That was in March 1964. In June 1964, in explaining the amendments, Senator Humphrey said, "This provision is in line with the provisions of section 602[98] and serves to spell out more precisely the declared scope of coverage of the title." In the same speech he stated (110 C.R. 12714): "We have made no changes of substance in Title VI." This explanation plainly indicates that the amendment was not intended as a statutory bar to faculty integration in schools receiving federal aid.

However, in the interval between these two explanations the Attorney General, in response to a letter from Senator Cooper, stated that Section 602 would not apply to federally aided employers who discriminated in employment practices: "Title VI is limited . . . to discrimination against the beneficiaries of

[98] See footnote 19.

federal assistance programs. . . . Where, however, employees are the intended beneficiaries of a program, Title VI would apply".[99] He gave as an example accelerated public works programs. It was after the receipt of the Attorney General's letter that the amended Senate bill was passed. The school boards argue therefore that Section 604 was enacted, because of the Attorney General's interpretation, to exclude interference with employment practices of schools.

In its broadest application this argument would allow racial discrimination in the hiring, discharge, and assignment of teachers. In its narrowest application this argument would allow discrimination in hiring and discharging but not in assigning teachers, an inexplicable anomaly.[100] There is no merit to this argument. Section 604 and the Attorney General's letter are not inconsistent, since under Section 601 it is the school children, not the teachers (employees), who are the primary beneficiaries of federal assistance to public schools. Faculty integration is essential to student desegregation. To the extent that teacher discrimination jeopardizes the success of desegregation, it is unlawful wholly aside from its effect upon individual teachers.

After Section 601 was proposed, additional clarifying language was suggested to make it clear that discrimination in certain employer-employee relationships, not affecting the intended beneficiaries of the program, would be excluded from the reach of the

[99] BNA Operations Manual, The Civil Rights Act of 1964, p. 359.
[100] See Note, Desegregation of Public School Activities, 51 Iowa L. Rev. 681, 690-96 (1966).

statute. See Hearings, H.R. Comm. on Rules, H. R. 7152, 88th Cong., 2d Sess. (1964), pp. 94, 226; 110 C.R. 6544-46 (Senator Humphrey). For example, there was a serious question as to whether the bill would forbid a farmer who was receiving benefits under the Agricultural Adjustment Act from discriminating upon the basis of race in the selection of his employees. Hearings, H.R. Comm. on Rules, H. R. 7152, 88 Cong., 2d Sess., 1964, p. 94, 110 C.R. 6545 (Senator Humphrey). The addition of Section 604 to the bill as originally proposed clearly excluded the application of the Act to this type of situation. Congress did not, of course, intend to provide a forum for the relief of individual teachers who might be discriminatorily discharged; Congress was interested in a general requirement essential to success of the program as a whole.[101]

Collaterally to their argument on Section 604, the defendants cite Section 701(b) of Title VII, covering Equal Employment Opportunities, which specifically excepts a "state or political subdivision thereof". This section has no application to schools. Section 701(b), defines "employer" as "a person engaged in an industry affecting commerce who has twenty-five or more employees. . . ."

[101] Senator Humphrey explained: The "elimination of racial discrimination in employment or assignment of teachers . . . does not mean that Title VI would authorize a federal official to prescribe [particular] pupil assignments, or to select a [particular] faculty as opponents of the bill have suggested. The only authority conferred would be authority to adopt, with the approval of the President, a general requirement that the local school authority refrain from racial discrimination in treatment of pupils and teachers . . ." 110 Cong. Rec. 6545.

Section 604 was never intended as a limitation on desegregation of schools. If the defendants' view of Section 604 were correct the purposes of the statute would be frustrated, for one of the keys to desegregation is integration of faculty. As long as a school has a Negro faculty it will always have a Negro student body. As the District Court for the Western District of Virginia put it in *Brown v. County School Board of Frederick County*, 1965, 245 F. Supp. 549, 560:

> "[T]he presence of all Negro teachers in a school attended solely by Negro pupils in the past denotes that school a 'colored school' just as certainly as if the words were printed across its entrance in six-inch letters."

As far as possible federal courts must carry out congressional policy. But we must not overlook the fact that "we deal here with constitutional rights and not with those established by statute".[102] The right of Negro students to be free from racial discrimination in the form of a segregated faculty is part of their broader right to equal educational opportunities. The "mandate of *Brown* . . . forbids the [discriminatory] consideration of race in faculty selection just as it forbids it in pupil placement." *Chambers v. Hendersonville City Board of Education*, 4 Cir. 1966, 364 F.2d 189.

In *Brown II* the Supreme Court specifically referred to the reallocation of staff as one of the reasons permitting desegregation "with all deliberate speed".

[102] Smith v. Board of Education of Morrilton, 8 Cir. 1966, 365 F.2d 770, 784.

"In determining the additional time necessary . . . courts may consider problems related to administration, arising from . . . *personnel*. . . ." (Emphasis added.) 349 U.S. at 301. For ten years, however, this Court and other circuit courts[103] had approved district courts' postponing hearings on faculty desegregation. *Bradley v. School Board of the City of Richmond*, 1965, 382 U. S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 put an end to this practice. In *Bradley* the Supreme Court held that faculty segregation had a direct impact on desegregation plans. The court summarily remanded the case to the district court holding that it was improper for that court to approve a desegregation plan without considering, at a full evidentiary hearing, the impact of faculty allocation on a racial basis. The Court said, "[There is] no merit to the suggestion that relation between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans are entirely speculative." Moreover, "Delays in desegregation of school systems are no longer tolerable." 382 U.S. at 105. In *Rogers v. Paul*, 1965, 382 U.S. 198, 200, 86 S.Ct. 358, 15 L.Ed.2d 265, the Supreme Court held that Negro students in grades not yet desegregated were entitled to an immediate transfer to a white high school. They "plainly had standing" to sue on two theories: (1) "that *racial allocation of faculty denies them equality of educational opportunity without regard to* segregation of pupils, and (2) that it renders inadequate an otherwise constitutional pupil desegregation

[103] For example, Lockett v. Board of Education of Muscogee County, 5 Cir. 1965, 345 F.2d 225, 229; Calhoun v. Latimer, 5 Cir. 1963, 321 F.2d 302, 307; Bradley v. School Board of the City of Richmond, 4 Cir. 1965, 345 F.2d 310, 320.

plan soon to be applied to their grades." In *Singleton II* this Court, relying on *Bradley,* held that it was "essential" for the Jackson schools to make an "adequate start toward elimination of race as a basis for the employment and allocation of teachers, administrators and other personnel." 355 F.2d at 870.

In a recent decision of the Eighth Circuit, *Clark v. Board of Education of Little Rock School District,* No. 18,368, December 15, 1966, the Court required a "positive program aimed at ending in the near future the segregation of the teaching and operating staff". The Court stated: "We agree that faculty segregation encourages pupil segregation and is detrimental to achieving a constitutionally required non-racially operated school system. It is clear that the Board may not continue to operate a segregated teaching staff. . . . It is also clear that the time for delay is past. The desegregation of the teaching staff should have begun many years ago. At this point the Board is going to have to take accelerated and positive action to end discriminatory practices in staff assignment and recruitment."

In *Braxton v. Board of Public Instruction of Duval County,* 1964, 326 F.2d 616, 620, *cert. denied* 377 U. S. 924, the case cited by Senator Humphrey, this Court affirmed an order of the district court prohibiting assignment of "teachers *and other personnel* . . . on a racially segregated basis." In *Smith v. Board of Education of Morrilton,* 8 Cir. 1966, 365 F.2d 770, 778, the Court said:

> "It is our firm conclusion that the reach of the Brown decisions, although they specifically concerned only pupil discrimination, clearly extends to the proscription of the employment and assignment of public school teachers on a racial basis. Cf. United Public Workers v. Mitchell, 330 U. S. 75, 100 (1947); Wieman v. Updegraff, 344 U. S. 183, 191-192 (1952). See Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U. S. 714, 721 (1963). This is particularly evident from the Supreme Court's positive indications that non-discriminatory allocation of faculty is indispensable to the validity of a desegregation plan. Bradley v. School Board of the City of Richmond, supra; Rogers v. Paul, supra. This court has already said, 'Such discrimination [failure to integrate the teaching staff] is proscribed by *Brown* and also the Civil Rights Act of 1964 and the regulations promulgated thereunder'. Kemp v. Beasley, supra, p. 22 of 352 F.2d."

In *Wheeler v. Durham City Board of Education,* 4 Cir. 1966, 363 F.2d 738, 740 the Court stated: "We read [*Bradley*] as authority for the proposition that removal of race considerations from faculty selection and allocation is, as a matter of law, an inseparable and indispensable command within the abolition of pupil segregation in public schools as pronounced in *Brown v. Board of Education,* 347 U.S. 483. Hence no proof of the relationship of faculty allocation and pupil assignment was required here. The only factual

issue is whether race was a factor entering into the employment and placement of teachers." In *Wright v. County School Board of Greensville County*, E.D. Va. 1966, 252 F. Supp. 378, 384, holding that a faculty desegregation provision approved by the Commissioner of Education was not sufficient, the court said:

> "The primary responsibility for the selection of means to achieve employment and assignment of staff on a nonracial basis rests with the school board. . . . Several principles must be observed by the board. Token assignments will not suffice. The elimination of a racial basis for the employment and assignment of staff must be achieved at the earliest practicable date. The plan must contain well defined procedures which will be put into effect on definite dates. The board will be allowed ninety days to submit amendments to its plan dealing with staff employment and assignment practices."

In *Kier v. County School Board of Augusta County*, W.D. Va. 1966, 249 F. Supp. 239, 247, the court held that free choice plans require faculty integration:

> "Freedom of choice, in other words, does not mean a choice between a clearly delineated 'Negro school' (having an all-Negro faculty and staff) and a 'white school' (with all-white faculty and staff). School authorities who have heretofore operated dual school systems for Negroes and whites must assume the duty of eliminating the effects of dualism before a

> freedom of choice plan can be superimposed upon the pre-existing situation and approved as a final plan of desegregation. It is not enough to open the previously all-white schools to Negro students who desire to go there while all-Negro schools continue to be maintained as such. . . . The duty rests with the School Board to overcome the discrimination of the past, and the long-established image of the 'Negro school' can be overcome under freedom of choice only by the presence of an integrated faculty."

See also *Dowell v. School Board of Oklahoma City Public Schools,* W.D. Okla. 1965, 244 F.Supp. 971, 977, and *Franklin v. County School Board of Giles County,* 4 Cir. 1966, 360 F.2d 325.

We cannot impute to Congress an intention to repudiate Senator Humphrey's explanation of Section 604 and to change the substance of Title VI, tearing the vitals from the statutory objective. Integration of faculty is indispensable to the success of desegregation plan. Nor can we impute to Congress the intention to license, unconstitutionally, discrimination in the employment and assignment of teachers, a conspicuous badge of de jure segregated schools.[104]

[104] Chambers v. Hendersonville City Board of Education, 4 Cir. 1966, 364 F.2d 189, 192, involved the problem of surplus Negro teachers who lost their jobs when an all Negro school was abolished. The School Board treated them as new applicants. The court held that this was discriminatory. Speaking for the majority, Judge Bell said: "First, the mandate of Brown v. Board of Education, 347 U.S. 483 (1954), forbids the consideration of race in faculty selection just as it forbids it in pupil placement. See Wheeler v. Durham City Board of Education, 346 F.2d 768, 773 (4 Cir. 1965). Thus the reduction in the number of

E. As we construe the Act and its legislative history, especially the sponsors' reliance on *Bell*, Congress, because of its hands-off attitude on bona fide neighborhood school systems, qualified its broad policy of nondiscrimination by precluding HEW's requiring the bussing of children across district lines or requiring compulsory placement of children in schools to strike a balance when the imbalance results from de facto, that is, non-racially motivated segregation. As Congressman Cramer said, "De facto segregation is racial imbalance". But *there is nothing in the language of the Act or in the legislative history that equates corrective acts to desegregate or to integrate a dual school system initially based on de jure segregation with acts to bring about a racial balance in a system based on bona fide neighborhood schools.*

Congress recognized that HEW's requirements for qualifying for financial assistance are one thing and the courts' constitutional and judicial responsibilities are something else again. The Act states, therefore, that it did not enlarge the courts' existing powers to ensure compliance with constitutional standards. *But neither did it reduce the courts' power.*

V.

The HEW Guidelines agree with decisions of this circuit and of the similarly situated Fourth and

Negro pupils did not justify a corresponding reduction in the number of Negro teachers. Franklin v. County Board of Giles County, 360 F.2d 325 (4 Cir. 1966). Second, the Negro school teachers were public employees who could not be discriminated against on account of their race with respect to their retention in the system. Johnson v. Branch, 364 F.2d 177, (4 Cir. 1966) . . ."

Eighth Circuits. And *they stay within the Congressional mandate*. There is no cross-district or cross-town bussing requirement. There is no provision requiring school authorities to place white children in Negro schools or Negro children in white schools for the purpose of striking a racial balance in a school or school district proportionate to the racial population of the community or school district.[105] The provision referring to percentages is a general rule of thumb or objective administrative guide for measuring progress in desegregation rather than a firm requirement that must be met.[106] See footnotes 105 and 106.

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[105] The present Commissioner of Education, Harold Howe II, in a congressional hearing declared:

> "The guidelines do not mention and do not require 'racial balance' or the correction of racial 'imbalance.' Nor have we in the administration of our obligations under Title VI sought to establish 'racial balance.' They deal only with desegregation plans designed to eliminate the dual school systems for whites and Negroes, systems being operated in violation of the 1954 Supreme Court ruling. . . . Racial imbalance certainly means the notion of trying to establish some proportion of youngsters that must be in each and every school. We are not about such an enterprise. We are trying to give the effect of free choices to enter into, or to allow free choices in having pupils enter into whatever school they may wish to attend. I do not believe that free choice plans were ever intended by the courts or by us to be an arrangement whereby the dual school system could continue without support of law. But rather an arrangement by which over a period of time we would gradually have one school system rather than two separate school systems. I do not see that we are engaged in any way in establishing procedures for balance." Hearings before the Committee on Rules, House of Representatives, 89th Cong. 2nd Sess., on H. Res. 26, Sept. 29-30, 1966, p. 32-34.

See also footnote 106.

[106] In a letter addressed to Members of Congress and Governors, dated April 9, 1966, and given wide publicity in the press, John W. Gardner, Secretary of Health, Education and Welfare explained the purpose of the percentages:

> "The second area of concern involves the percentages mentioned in the guidelines. Some have contended that this portion of the guidelines imposes a formula of 'racial balance.'

Good faith in compliance should be measured by performance, not promises.

In reviewing the effectiveness of an approved plan it seems reasonable to use some sort of yardstick or objective percentage guide. The percentage requirements in the Guidelines are modest, suggesting only that systems using free choice plans for at least two years should expect 15 to 18 per cent of the pupil population to have selected desegregated schools. This Court has frequently relied on percentages in jury ex-

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This contention misconceives the purpose of the percentages. The prevailing method of desegregation is what is called the 'free choice' plan. Under such a plan, students select their schools instead of being assigned to them on a geographic basis. Courts have expressly conditioned their approval of such plans on affirmative action by school boards to insure that 'free choice' actually exists. It is our responsibility to review such plans to insure that the choice is, in fact, free and to indicate to school districts what procedures should be used to assure true freedom of choice.

In seeking appropriate criteria to guide us in review of free choice plans, we have adopted the objective criteria applied by the courts in similar situations. One such criterion is the distribution of students by race in the various schools of a system after the students have made their choices. If substantial numbers of Negro children choose and go to previously all-white schools, the choice system is clearly operating freely. If few or none choose to do so in a community where there has been a pattern of segregation, then it is appropriate that the free choice plan be reviewed and other factors considered to determine whether the system is operating freely.

With more than 2000 separate districts to consider, such percentages are thus an administrative guide which helps us to determine those districts requiring further review. Such review in turn will determine whether or not the freedom of choice plan is in fact working fairly." New York Times, April 12, 1966, page 1.

Printed in Hearings before the Committee on Rules, House of Representatives, 89 Cong. 2nd Sess., on H. Res. 826, Sept. 29-30, 1966, p. 31. Commissioner Howe reaffirmed Secretary Gardner's policies as stated in the letter. See Hearings on H. Res. 826, p. 30-33.

clusion cases. Where the percentage of Negroes on the jury and jury venires is disproportionately low compared with the Negro population of a county, a prima facie case is made for deliberate discrimination against Negroes.[107] Percentages have been used in other civil rights cases.[108] A similar inference may be drawn in school desegregation cases, when the number of Negroes attending school with white children is manifestly out of line with the ratio of Negro school children to white school children in public schools. Common sense suggests that a gross discrepancy between the ratio of Negroes to white children in a school and the HEW percentage guides raises an inference that the school plan is not working as it should in providing a unitary, integrated system. Thus *Evans v. Buchanan,* D.C. Del. 1962, 207 F. Supp. 820[109] held that this natural inference coupled with the board's possessing the probative facts that might rebut the inference created a presumption that the proposed desegregation plan was unconstitutional.

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[107] "Very decided variations in proportions of Negroes and whites on jury lists from racial proportions in the population, which variations are not explained and are long continued, furnish evidence of systematic exclusion of Negroes from jury service." United States ex rel. Seals v. Wiman, 5 Cir. 1962, 304 F.2d 53, 67.

[108] In United States v. Ward, supra at 803, the Court compared the number of Negroes registered with the number of Negroes eligible to vote. A similar practice is used in proving systematic exclusion of Negroes from juries. Cassell v. Texas, 1950, 339 U.S. 282; Avery v. Georgia, 1953, 345 U.S. 559; Smith v. Texas, 1940, 311 U.S. 128. In each instance, percentage tests have been used not as an effort to effect racial balance, but as a means of determining whether a challenged procedure is operating in a way that violates constitutional rights. See Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv. L. Rev. 338 (1966).

[109] See footnote 58.

The Guidelines were adopted for the entire country. However, they have been formulated in a context sympathetic with local problems. Sections 403-405 of the 1964 Civil Rights Act provide that, upon request, the Commissioner of Education may render technical assistance to public school systems engaged in desegregation. The Commissioner may also establish training institutes to counsel school personnel having educational problems occasioned by desegregation; and the Commissioner may make grants to school boards to defray the costs of providing in-service training on desegregation. In short, the Commissioner may assist those school boards who allege that they will have difficulty complying with the guidelines. When desegregation plans do not meet minimum standards, the school authorities should ask HEW for assistance. And district courts should invite HEW to assist by giving advice on raising the levels of the plans and by helping to coordinate a school's promises with the school's performance. In view of the competent assistance HEW may furnish schools, there is a heavy burden on proponents of the argument that their schools cannot meet HEW standards.

VI.

School authorities in this circuit, with few exceptions, have turned to the "freedom of choice" method for desegregating public schools. The method has serious shortcomings. Indeed, the "slow pace of integration in the Southern and border States is in large measure attributable to the manner in which

free choice plans . . . have operated."[110] When such plans leave school officials with a broad area of uncontrolled discretion, this method of desegregation is better suited than any other to preserve the essentials of the dual school system while giving paper compliance with the duty to desegregate.

A free choice plan does not abandon geographical criteria, but requires no rigid adherence to attendance zones. Theoretically every child may choose his school, but its effectiveness depends on the availability of open places in balanced schools. Moreover, unless there is some provision to prevent white children transferring out of an imbalanced school this plan will promote resegregation.[111]

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[110] Rep. U. S. Comm. on Civil Rights, Survey of School Desegregation in the Southern and Border States—1965-66, p. 51. "Freedom of choice plans accepted by the Office of Education have not disestablished the dual and racially segregated school systems involved, for the following reasons: a. Negro and white schools have tended to retain their racial identity; b. White students rarely elect to attend Negro schools; c. Some Negro students are reluctant to sever normal school ties, made stronger by the racial identification of their schools; d. Many Negro children and parents in Southern States, having lived for decades in positions of subservience, are reluctant to assert their rights; e. Negro children and parents in Southern States frequently will not choose a formerly all-white school because they fear retaliation and hostility from the white community; f. In some school districts in the South, school officials have failed to prevent or punish harassment by white children of Negro children who have elected to attend white schools; g. In some areas in the South where Negroes have elected to attend formerly all-white schools, the Negro community has been subjected to retaliatory violence, evictions, loss of jobs, and other forms of intimidation." Ibid.

[111] See Goss v. Board of Education, 1963, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632; Dillard v. School Board of the City of Charlottesville, 4 Cir. 1962, 308 F.2d 920, cert. den'd 374 U.S. 827 (1963); Jackson v. School Board of the City of Lynchburg, 4 Cir. 1963, 321 F.2d 230. For discussion of limitations to a free choice plan, see Fiss, Racial Imbalance in the Public Schools, 78 Harv. L. Rev. 563, 572 (1965).

"Under freedom of choice plans, schools tend to retain their racial identification."[112] Such plans require affirmative action by parents and pupils to disestablish the existing system of public schools. In this circuit white students rarely choose to attend schools identified as Negro schools. Negro students who choose white schools are, as we know from many cases, only Negroes of exceptional initiative and fortitude. New construction and improvements to the Negro school plant attract no white students and diminish Negro motivation to ask for transfer. Nevertheless, the Eighth Circuit has approved freedom of choice plans "as a permissible method at this stage", although recognizing that such a plan "is still only in the experimental stage and it has not yet been demonstrated that such a method will fully implement the decision of *Brown* and subsequent cases and the legislative declaration of §2000(d) of the Civil Rights Act of 1964."[113] We have said: "At this stage in the history of desegregation in the deep South a 'freedom of choice plan' is an acceptable method for a school board to use in fulfilling its duty to integrate the school system. In the long run, it is hardly possible that schools will be administered on any such haphazard basis". *Singleton II*, 355 F.2d at 71. HEW

[112] Rep. U. S. Comm. on Civ. Rights, Survey of Desegregation in the Southern and Border States, 1965-66, p. 33. The Commission also notes that racial identification of schools as Negro schools is strengthened by: (1) normal school ties; (2) the interest Negro administrators and teachers have in maintaining the dual system (from May 1965 to September 1965, 668 Negro teachers became surplus because of desegregation); (3) some Negro educators are opposed to desegregation, because past economic and cultural deprivation makes Negroes ill prepared to compete with white children in schools.

[113] Kemp v. Beasley, 8 Cir. 1965, 352 F.2d 14, 21.

recognizes freedom of choice as a permissible means of desegregation. See Revised Guidelines, Subpart B, 181.11, and all of Subpart D.

Courts should closely scrutinize all such plans. Freedom of choice plans "may . . . be invalid because the 'freedom of choice' is illusory. The plan must be tested not only by its provisions, but by the manner in which it operates to provide opportunities for a desegregated education." *Wright v. County School Board of Greenville County,* E.D.Va. 1966, 252 F.Supp. 378, 383. In that case the court was concerned that "operation under the plan may show that the transportation policy or the capacity of the schools severely limits freedom of choice, although provisions concerning these phases are valid on their face". In *Lockett v. Board of Education of Muskogee County, Ga.,* 5 Cir. 1965, 342 F.2d 225, we were concerned that "proper notice" be given so that "Negro students are afforded a reasonable and conscious opportunity to apply for admission to any school which they are otherwise eligible to attend without regard to race". Also, as Judge Bell, for the Court, pointed out, "a necessary part of the plan is a provision that the dual or biracial school attendance system . . . be abolished." See also *Dowell v. School Board of Oklahoma City Public Schools,* W.D.Okla. 1965, 244 F. Supp. 971; *Bell v. School Board of City of Staunton,* W.D.Va. 1966, 249 F.Supp. 249; *Kier v. County School Board of Augusta County,* W.D. Va. 1966, 249 F.Supp. 239.

There is much that school authorities should do to meet their responsibilities:

> "[*Brown*] called for responsible public officials to reappraise their thinking and policies, and to make every effort to afford Negroes the more meaningful equality guaranteed them by the Constitution. The Brown decision, in short, was a lesson in democracy, directed to the public at large and more particularly to those responsible for the operation of the schools. It imposed a legal and moral obligation upon officials who had created or maintained segregated schools to undo the damage which they had fostered." *Taylor v. Board of Education of the City of New Rochelle*, S.D.N.Y. 1961, 191 F. Supp. 181, 187, aff'd 294 F.2d 36, cert. den'd 368 U.S. 940 (1961).

School officials should consult with Negro and white school authorities before plans are put in final form. They should see that notices of plans and procedures are clear and timely. They should avoid the discriminatory use of tests and the use of birth and health certificates to make transfers difficult. They should eliminate inconvenient or burdensome arrangements for transfer, such as requiring the personal appearance of parents, notarized forms, signatures of both parents, or making forms available at inconvenient times to working people. They should employ forms which do not designate the name of a Negro school as the choice or contain a "waiver" of the "right" to attend white schools. Certainly school officials should not discourage Negro children from en-

rolling in white schools, directly or indirectly, as for example, by advising them that they would not be permitted to engage or would not want to engage in school activities, athletics, the band, clubs, school plays. If transportation is provided for white children, the schedules should be re-routed to provide for Negro children. Overcrowding should not be used as an excuse to avoid transfers of Negro children. In *Bradley v. School Board of the City of Richmond*, 4 Cir. 1965, 345 F.2d 310, 323, Judges Sobeloff and Bell, concurring, said:

> "A plan of desegregation is more than a matter of words. The attitude and purpose of public officials, school administrators and faculties are an integral part of any plan and determine its effectiveness more than the words employed. If these public agents translate their duty into affirmative and sympathetic action the plan will work; if their spirit is obstructive, or at best negative, little progress will be made, no matter what form of words may be used."

Freedom of choice means the maximum amount of freedom and clearly understood choice in a bona fide unitary system where schools are not white schools or Negro schools—just schools.

We turn now to a discussion of the specific elements of a freedom of choice plan that make it more than a mere word of promise to the ear.

A. *Speed of Desegregation.* The announced speed of desegregation no longer seems to be a critical issue. The school boards generally concede that by the school year 1967-68 *all* grades should be desegregated.

B. *Mandatory Annual Free Choice.* Underlying and tending to counteract the effectiveness of all the freedom of choice plans before the Court is the initial unconstitutional assignment of all students by race. When the freedom of choice plan is "permissive" or "voluntary" the effect is to superimpose the same old transfer plan on racial assignments and dual zones. We hold that any freedom of choice plan is inadequate if based upon a preliminary system of assignment by race or dual geographic zones. See *Singleton II* and *Lockett v. Board of Education of Muscogee County, Ga.*, 5 Cir. 1965, 342 F.2d 225, restating the requirement of *Stell v. Savannah-Chatham County Board of Education*, 5 Cir. 1964, 333 F.2d 55 and *Gaines v. Dougherty County Board of Education*, 5 Cir. 1964, 334 F.2d 983. It is essential that dual or biracial school attendance systems be abolished contemporaneously with the application of a plan to the respective grades reached by it.

In place of permissive freedom of choice there must be a mandatory annual free choice of schools by all students, both white and Negro. "If a child or his parent is to be given a meaningful choice, this choice must be afforded annually." *Kemp v. Beasley*, 8 Cir. 1965, 352 F.2d 14, 22. The initial choice of assignment, within space limitations, should be made by a parent or by a child over fifteen without regard to race. This

mandatory free choice system would govern even the initial assignment of students to the first grade and to kindergarten. At the minimum, a freedom of choice plan should provide that: (1) *all* students in desegregated grades shall have an opportunity to exercise a choice of schools. *Bradley v. School Board of the City of Richmond*, 4 Cir. 1965, 345 F.2d 310, vacated and remanded, 1965, 382 U.S. 103; (2) where the number of applicants applying to a school exceeds available space, preferences will be determined by a uniform non-racial standard, *Stell v. Savannah-Chatham County Board of Education*, 5 Cir. 1964, 333 F.2d 55, 65; and (3) when a student fails to exercise his choice, he will be assigned to a school under a uniform non-racial standard, *Kemp v. Beasley*, 8 Cir. 1965, 352 F.2d 14, 22.

C. *Notice.* The notice provisions of the HEW Guidelines are reasonable and should be followed. Where public notice by publication in a newspaper will assure adequate notice, individual notice will not be necessary. Individual notice should be required if notice by publication is likely to be inadequate.

D. *Transfers for Students in Non-desegregated Grades and with Special Needs.* In *Singleton II* we held that children in still-segregated grades in Negro schools "have an absolute right, as individuals, to transfer to schools from which they were excluded because of their race."[114] 355 F.2d at 869. See also

[114] This was not new. In 1957 a district court in Maryland held that stair step plans do not justify excluding a qualified individual, notwithstanding a more gradual schedule applicable to the

Rogers v. Paul, 1965, 382 U. S. 198, 15 L.Ed.2d 265. A transfer provision should be included in the plan. The right to transfer under a state Pupil Placement Law should be regarded as an additional right that takes into consideration criteria irrelevant to the absolute right referred to in *Rogers v. Paul.*

E. *Services, Facilities, Activities, and Programs.* In *Singleton II* we held that there should be no segregation or discrimination in services, facilities, activities, and programs that may be conducted or sponsored by, or affiliated with, the school in which a student is enrolled. We have in mind school athletics and inter-scholastic associations of course, but also parents-teachers associations. In order to eliminate any uncertainty on this point, we hold that the plan should contain a statement that there will be no such segregation or discrimination.

F. *School Equalization.* In recent years, as we are all well aware, Southern states have exerted great effort to improve Negro school plants. There are however many old and inferior schools readily identifiable as Negro schools; there are also many superior white schools, in terms of the quality of instruction. A freedom of choice plan will be ineffective if the students cannot choose among schools that are substantially equal. A school plan therefore should provide for

school population generally. Moore v. Board of Education of Harford County, D.Md. 1957, 146 F. Supp. 91 and 152 F.Supp. 114, aff'd sub.nom. Slade v. Board of Education, 4 Cir. 1958, 252 F.2d 191, cert. den'd 357 U.S. 906 (1958). This Court approved such an order in Augustus v. Board of Education, 5 Cir. 1962, 306 F.2d 863.

closing inferior schools and should also include a provision for remedial programs to overcome past inadequacies of all-Negro schools. This will, of course, require the local school authorities and the trial courts to examine carefully local situations and perhaps seek advice from qualified, unbiased authorities in the field.

G. *Scheduled Compliance Reports.* Scheduled compliance reports to the court on the progress of freedom of choice plans are a necessity and of benefit to all the parties. These should be required following the choice period and again after the opening of school. None of the school boards expressly objected to this provision, or one similar to it, and it does not appear onerous.

H. *Desegregation of Faculty and Staff.* The most difficult problem in the desegregation process is the integration of faculties. See Section IV D of this opinion. A recent survey shows that until the 1966-67 session not a single Negro teacher in Alabama, Louisiana, or Mississippi has been assigned to a school where there are white teachers.[115] As evidenced in numerous records, this long continued policy has resulted in inferior Negro teaching and in inferior education of Negroes as a class. Everyone agrees, on principle, that the selection and assignment of teachers on merit should not be sacrificed just for the sake of integrating faculties; teaching is an art. Yet until

[115] See footnote 35. However, the press has carried accounts that progress is being made toward "desegregation of teachers, administrators and other personnel" for 1967-68 in Jackson, Mississippi. See Jackson Clarion Ledger, July 30, 1966, page 1.

school authorities recognize and carry out their affirmative duty to integrate faculties as well as facilities, there is not the slightest possibility of their ever establishing an operative non-discriminatory school system.[116] The transfer of a few Negro children to a white school does not do away with the dual system. A Negro faculty makes a Negro school; the Negro school continues to offer inferior educational opportunities; and the school system continues its psychological harm to Negroes as a class by not putting them on an equal level with white children as a class.[117] To prevent such harm or to undo the harm, or to prevent resegregation, the school authorities, even in the administration of an otherwise rational, nondiscriminatory policy, should take corrective action involving racial criteria. As we pointed out (see Section III C), in fashioning an appropriate remedy tending to undo past discrimination this Court has often taken race into account.

In the past year, district courts have struggled with the problem of framing effective orders for the desegregation of faculty. (1) Some courts have focused upon the specific results to be reached by reassign-

[116] "Faculty desegregation is a necessary precondition of an acceptable free choice plan. A free choice plan cannot disestablish the dual school system where faculties remain segregated on the basis of the race of the teachers or the pupils. In such circumstances a school inevitably will remain identified as "white" and "Negro" depending on the color of the teachers." Rep., U.S. Comm. on Civil Rights, Survey of Desegregation in the Southern and Border States—1965-66, p. 57.

[117] Faculties should be desegregated so that "both white and Negro students would feel that their color was represented upon an equal level and that their people were sharing the responsibility of high-level teaching". Dowell v. School Board of Oklahoma City Public Schools, W.D. Okla. 1965, 219 F. Supp. 427.

ment of teachers previously assigned solely upon the basis of their race. *Dowell v. School Board of Oklahoma City Public Schools,* W.D.Okla. 1965, 244 F. Supp. 971, *Kier v. County School Board of Augusta County,* W.D.Va. 1966, 249 F. Supp. 239.[118] The orders entered in these cases require the defendant school boards to assign any newly employed teachers and reassign already-employed faculty so that the proportion of each race assigned to teach in each school will be the same as the proportion of teachers of that race in the total teaching staff in the system, or at least, of the particular school level in which they are employed. (2) Other courts have not been specific as to the number of teachers of each race that should be assigned to each school in order to remove the effects of past discriminatory assignments. These courts have focused upon the mechanics to be followed in removing the effect of past discrimination rather than upon the result as such. Thus, in *Beckett v. School Board of the City of Norfolk,* Civil Action No. 2214 (E.D.Va., 1966); *Gilliam v. School Board of the City of Hopewell,* Civil Action No. 3554 (E.D.Va. 1966); and *Bradley v. School Board of the City of Richmond,* Civil Action No. 3353 (E.D.Va. 1966), the courts approved consent decrees setting forth in detail the considerations that would control the school administrators in filling faculty vacancies and in transferring already-

[118] In *Kier* the Court said that duty to desegregrate faculty must be "immediately and squarely met"; there can be no freedom of choice for faculties and administrative staffs by the 1966-67 school year. Insofar as possible, "the percentage of Negro teachers in each school of the system should approximate the percentage of Negro teachers in the entire system for the 1965-66 season". 249 F. Supp. at 22.

employed faculty members in order to facilitate faculty integration. (3) In a third group of cases, the district court, while emphasizing the necessity of affirmative steps to undo the effects of past racial assignments of faculty and while requiring some tangible results, has not been specific regarding the mechanics or the specific results to be achieved. See *Harris v. Bullock County Board of Education,* M.D Ala. 1966, 253 F. Supp. 276; *United States v. Lowndes Board of Education,* Civil Action No. 2328-N (M.D.Ala. 1966); *Carr v. Montgomery County Board of Education,* M.D.Ala. 1966, 253 F. Supp. 306.

We agree with the Eighth Circuit's statement: "The lack of a definite program will only result in further delay of long overdue action. We are not content at this late date to approve a desegregation plan that contains only a statement of general good intention. We deem a positive commitment to a reasonable program aimed at ending segregation of the teaching staff to be necessary for the final approval of a constitutionally adequate desegregation plan." *Clark v. Board of Education of the Little Rock School District,* No. 18,368, December 15, 1966 (unreported). In that case the Court did not impose "a set time with fixed mathematical requirements". However the Court was firm in its position: "First, as the Board has already positively pledged, future employment, assignment, transfer, and discharge of teachers must be free from racial consideration. Two, should the desegregation process cause the closing of schools employing individuals predominately of one race, the

displaced personnel should, at the very minimum, be absorbed into vacancies appearing in the system. *Smith v. Board of Education of Morrilton, supra.* Third, whenever possible, requests of individual staff members to transfer into minority situations should be honored by the Board. Finally, we believe the Board should make all additional positive commitments necessary to bring about some measure of racial balance in the staffs of the individual schools in the very near future. The age old distinction of 'white schools' and 'Negro schools' must be erased. The continuation of such distinctions only perpetrates inequality of educational opportunity and places in jeopardy the effective future operation of the entire 'freedom of choice' type plan."

In *Singleton I* we agreed with the original HEW Guidelines in requiring that an "adequate start" toward faculty desegregation should be made in 1966-67. The requirement that all grades be desegregated in 1967-68 increases the need for substantial progress beyond an "adequate start". It is essential that school officials (1) cease practicing racial discrimination in the hiring and assignment of *new* faculty members and (2) take affirmative programmatic steps to correct existing effects of past racial assignment. If these two requirements are prescribed, the district court should be able to add specifics to meet the particular situation the case presents. The goal should be an equitable distribution of the better teachers.[119]

[119] Rev. Theodore M. Hesburgh, President of Notre Dame and a member of the Civil Rights Commission, makes these suggestions: "A realistic and quite possible approach to this is, I think, through the immediate improvement of all teachers of each race,

We anticipate that when district courts and this Court have gained more experience with faculty integration, the Court will be able to set forth standards more specifically than they are set forth in the decrees in the instant cases.

VII.

We attach a decree to be entered by the district courts in these cases consolidated on appeal. See Appendix A.

We have carefully examined each of the records in these cases. In each instance the record supports the decree. However, the provisions of the decree are intended, as far as possible, to apply uniformly throughout this circuit in cases involving plans based on free choice of schools. School boards, private plaintiffs, and the United States may, of course, come into court to prove that exceptional circum-

beginning with those who most need assistance in being better qualified as teachers. ¶ At this precise time of transition, why not institute along with the whole process of desegregation in the South a positive program of upgrading all teachers in the present systems? In fact, the best teachers of either race, worthy of their profession, should be put in the schools needing the most help to improve. One might even think of rotating teachers within the schools of a given district. There is already the existing pattern of academic year and summer institutes for just this purpose of improving teachers. . . . ¶ If this positive action could be moved along quickly, with good will from all concerned, school administrators, parents, and students, then we could eliminate the present cat-and-mouse game which is going on between the Federal Office of Education and the local Southern school districts. In fact, I have a feeling that the South could solve its problem long before the North, which has an educational desegregation problem which may be less amenable to solution because of entrenched patterns of housing segregation." Rep., U. S. Comm. on Civil Rights, Survey of Desegregation in the Southern and Border States—1965-66, p. 64.

stances compel modification of the decree. For example, school systems in areas which let school out during planting and harvesting seasons may find that the period for exercise of choice of schools, March 1-31, should be changed to a different month.

As *Brown* dictates, the decree places responsibility on the school authorities to take affirmative action to bring about a unitary, non-racial system. As the Constitution dictates, the proof of the pudding is in the eating: the proof of a school board's compliance with constitutional standards is the result—the performance. Has the operation of the promised plan actually eliminated segregated and token-desegregated schools and achieved substantial integration?

The substantive requirements of the decree derive from the Fourteenth Amendment as interpreted by decisions of the Supreme Court and of this Court, in many instances before the HEW Guidelines were published. For administrative details, we have looked to the Office of Education. For example, those familiar with the HEW Guidelines will note that the decree follows the Guidelines exactly as to the form letters which go to parents announcing the need to exercise a choice of schools, and the forms for exercising that choice are the same. Indeed a close parallel will be noted between much in Parts II through V of the decree and the Guideline provisions.

The great bulk of the school districts in this circuit have applied for federal financial assistance and

therefore operate under voluntary desegregation plans.[120] Approval of these plans by the Office of Education qualifies the schools for federal aid. In this opinion we have held that the HEW Guidelines now in effect are constitutional and are within the statutory authority created in the Civil Rights Act of 1964. Schools therefore, in compliance with the Guidelines can in general be regarded as discharging constitutional obligations.

Some schools have made no move to desegregate or have had plans rejected as unsatisfactory by district courts or the HEW. We expect the provisions of the decree to be applied in proceedings involving such schools. Other schools have earlier court-approved plans which fall short of the terms of the decree. On motion by proper parties to re-open these cases, we expect these plans to be modified to conform with our decree. In some cases the parties may challenge various aspects of HEW-approved plans. Our approval of the existing Guidelines and the deference owed to any future Guidelines is not intended to deny a day in court to any person asserting individual rights or

[120] "Although only 164 (3.4 percent) of the 4,941 school districts in the South have qualified by the court order route, these districts include most of the major cities of the South and, accordingly, a large share of the population. Court orders are a significant method of qualification particularly in Louisiana, where official resistance to compliance with Title VI has been most widespread. In Louisiana, 32 court orders have been accepted, affecting 86.5 percent of the school districts judged qualified." 1966—U. S. Comm. on Civ. Rights, Survey of School Desegregation in the Southern and Border States 46. See also Table 3 in Appendix B.

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to any school board contesting HEW action.[121] In any school desegregation case the issue concerns the constitutional rights of Negroes, individually and as a class, and the constitutional rights of the State—not the issue whether federal financial assistance should be withheld under Title VI of the Civil Rights Act of 1964.

When school systems are under court-ordered desegregation, the courts are responsible for determining the sufficiency of the system's compliance with the decree. The courts' task, therefore, is a continuing process, especially in major areas readily susceptible of observation and measurement, such as faculty integration and student desegregation. (1) As to faculty, we have found that school authorities have an affirmative duty to break up the historical pattern of segregated faculties, the hall-mark of the dual system. To aid the courts in its task, the decree requires the school authorities to report to the district courts the progress made toward faculty integration. The school authorities bear the burden of justifying an apparent lack of progress.[122] (2) As to students, the

[121] For an HEW approved desegregation plan held insufficient to protect constitutional rights of Negro students see Brown v. Board of Education of DeWitt School District, E.D. Ark. 1966, F.Supp.

See also Thompson v. County School Board of Hanover County, E.D.Va. 1966, 252 F. Supp. 546; Turner v. County School Board of Goochland County, E.D.Va. 1966, 252 F. Supp. 578.

[122] "Innumerable cases have clearly established the principle that under circumstances such as this where a history of racial discrimination exists, the burden of proof has been thrown upon the party having the power to produce the facts. . . ." Chambers v. Hendersonville City Board of Education, 4 Cir. 1966, 364 F.2d 189, 192. In *Brown II,* permitting desegregation with "*deliberate* speed" the Supreme Court put the "burden . . . upon the defendants to establish that [additional] time is necessary to carry out the ruling in an effective manner". 349 U.S. at 302.

decree requires school authorities to make reports to the court showing by race, by school, by grade, the choices made in each "choice period". A similar report is required after schools open to show what actually happened when schools opened.

What the decree contemplates, then, is continuing judicial evaluation of compliance by measuring the performance—not merely the promised performance—of school boards in carrying out their constitutional obligation "to disestablish dual, racially segregated school systems and to achieve substantial integration within such systems."[123] District courts may call upon HEW for assistance in determining whether a school board's performance measures up to its obligation to desegregate. If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, such as a geographic attendance plan, a combination of the two, the Princeton plan,[124] or some other acceptable substitute, perhaps aided by an educational park. Freedom of choice is not a key that opens all doors to equal educational opportunities.

Given the knowledge of the educators and administrators in the Office of Education and their day to

[123] U. S. Comm. on Civil Rights, Survey of School Desegregation in the Southern and Border States 1965-66, p. 54.

[124] The Princeton plan involves establishing attendance zones including more than one school and assigning students by grade rather than by residence location. Thus all of the zone's students in grades 1 through 3 would attend school A, while all students in grades 4 through 6 would attend school B. For a discussion of the plan see Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564, 573 (1965).

day experience with thousands of school systems, judges and school officials can ill afford to turn their backs on the proffer of advice from HEW. Or from any responsible government agency or independent group competent to work toward solution of the complex problem of de jure discrimination bequeathed this generation by ten preceding generations.

Now after twelve years of snail's pace progress toward school desegregation, courts are entering a new era. The question to be resolved in each case is: How far have formerly de jure segregated schools progressed in performing their affirmative constitutional duty to furnish equal educational opportunities to all public school children? The clock has ticked the last tick for tokenism and delay in the name of "deliberate speed".

* * * * *

In the suit against the Caddo Parish School Board July 19, 1965, the United States moved to intervene under §902 of the Civil Rights Act of 1964 (42 U.S.C. §2000h-2). The motion was filed twelve days after the Board submitted its plan in compliance with the district court's decree of June 14, 1965, but two days before the original plaintiffs filed their objections and before the court issued its order approving the plan. The district court denied the motion on the ground that it came too late. In these circumstances we consider that the motion was timely filed and should have been granted.

This Court denied the motion of certain appellants to consolidate their cases, but allowed consolidation of briefs and, in effect, treated the cases as consolidated for purposes of appeal. The Court, however, in each case has separately considered the particular contentions of all the parties in the light of the record.

The Court REVERSES the judgments below and REMANDS each case to the district court for further proceedings in accordance with this opinion.

COX, District Judge: I reserve the right to dissent in whole or in part at a later date.

APPENDIX A:

PROPOSED DECREE

It is ORDERED, ADJUDGED and DECREED that the defendants, their agents, officers, employees and successors and all those in active concert and participation with them, be and they are permanently enjoined from discriminating on the basis of race or color in the operation of the school system. As set out more particularly in the body of the decree, they shall take affirmative action to disestablish all school segregation and to eliminate the effects of past racial discrimination in the operation of the school system:

I.

SPEED OF DESEGREGATION

Commencing with the 1967-68 school year, in accordance with this decree, all grades, including kindergarten grades, shall be desegregated and pupils assigned to schools in these grades without regard to race or color.

II.

EXERCISE OF CHOICE

The following provisions shall apply to all grades:

(a) *Who May Exercise Choice.* A choice of schools may be exercised by a parent or other adult person

serving as the student's parent. A student may exercise his own choice if he (1) is exercising a choice for the ninth or a higher grade, or (2) has reached the age of fifteen at the time of the exercise of choice. Such a choice by a student is controlling unless a different choice is exercised for him by his parent or other adult person serving as his parent during the choice period or at such later time as the student exercises a choice. Each reference in this decree to a student's exercising a choice means the exercise of the choice, as appropriate, by a parent or such other adult, or by the student himself.

(b) *Annual Exercise of Choice.* All students, both white and Negro, shall be required to exercise a free choice of schools annually.

(c) *Choice Period.* The period for exercising choice shall commence May 1, 1967 and end June 1, 1967, and in subsequent years shall commence March 1 and end March 31 preceding the school year for which the choice is to be exercised. No student or prospective student who exercises his choice within the choice period shall be given any preference because of the time within the period when such choice was exercised.

(d) *Mandatory Exercise of Choice.* A failure to exercise a choice within the choice period shall not preclude any student from exercising a choice at any time before he commences school for the year with respect to which the choice applies, but such choice may be subordinated to the choices of students who

exercised choice before the expiration of the choice period. Any student who has not exercised his choice of school within a week after school opens shall be assigned to the school nearest his home where space is available under standards for determining available space which shall be applied uniformly throughout the system.

(e) *Public Notice.* On or within a week before the date the choice period opens, the defendants shall arrange for the conspicuous publication of a notice describing the provisions of this decree in the newspaper most generally circulated in the community. The text of the notice shall be substantially similar to the text of the explanatory letter sent home to parents. (See paragraph II(e).) Publication as a legal notice will not be sufficient. Copies of this notice must also be given at that time to all radio and television stations serving the community. Copies of this decree shall be posted in each school in the school system and at the office of the Superintendent of Education.

(e) *Mailing of Explanatory Letters and Choice Forms.* On the first day of the choice period there shall be distributed by first-class mail an explanatory letter and a choice form to the parent (or other adult person acting as parent, if known to the defendants) of each student, together with a return envelope addressed to the Superintendent. Should the defendants satisfactorily demonstrate to the court that they are unable to comply with the requirement

of distributing the explanatory letter and choice form by first-class mail, they shall propose an alternative method which will maximize individual notice, i.e., personal notice to parents by delivery to the pupil with adequate procedures to insure the delivery of the notice. The text for the explanatory letter and choice form shall essentially conform to the sample letter and choice form appended to this decree.

(g) *Extra Copies of the Explanatory Letter and Choice Form.* Extra copies of the explanatory letter and choice form shall be freely available to parents, students, prospective students, and the general public at each school in the system and at the office of the Superintendent of Education during the times of the year when such schools are usually open.

(h) *Content of Choice Form.* Each choice form shall set forth the name and location of the grades offered at each school and may require of the person exercising the choice the name, address, age of student, school and grade currently or most recently attended by the student, the school chosen, the signature of *one* parent or other adult person serving as parent, or where appropriate the signature of the student, and the identity of the person signing. No statement of reasons for a particular choice, or any other information, or any witness or other authentication, may be required or requested, without approval of the court.

(i) *Return of Choice Form.* At the option of the person completing the choice form, the choice may

be returned by mail, in person, or by messenger to any school in the school system or to the office of the Superintendent.

(j) *Choices not on Official Form.* The exercise of choice may also be made by the submission in like manner of any other writing which contains information sufficient to identify the student and indicates that he has made a choice of school.

(k) *Choice Forms Binding.* When a choice form has once been submitted and the choice period has expired, the choice is binding for the entire school year and may not be changed except in cases of parents making different choices from their children under the conditions set forth in paragraph II (a) of this decree and in exceptional cases where, absent the consideration of race, a change is educationally called for or where compelling hardship is shown by the student.

(l) *Preference in Assignment.* In assigning students to schools, no preferences shall be given to any student for prior attendance at a school and, except with the approval of court in extraordinary circumstances, no choice shall be denied for any reason other than overcrowding. In case of overcrowding at any school, preference shall be given on the basis of the proximity of the school to the homes of the students choosing it, without regard to race or color. Standards for determining overcrowding shall be applied uniformly throughout the system.

(m) *Second Choice where First Choice is Denied.* Any student whose choice is denied must be promptly notified in writing and given his choice of any school in the school system serving his grade level where space is available. The student shall have seven days from the receipt of notice of a denial of first choice in which to exercise a second choice.

(n) *Transportation.* Where transportation is generally provided, buses must be routed to the maximum extent feasible in light of the geographic distribution of students, so as to serve each student choosing any school in the system. Every student choosing either the formerly white or the formerly Negro school nearest his residence must be transported to the school to which he is assigned under these provisions, whether or not it is his first choice, if that school is sufficiently distant from his home to make him eligible for transportation under generally applicable transportation rules.

(o) *Officials not to Influence Choice.* At no time shall any official, teacher, or employee of the school system influence any parent, or other adult person serving as a parent, or any student, in the exercise of a choice or favor or penalize any person because of a choice made. If the defendant school board employs professional guidance counselors, such persons shall base their guidance and counselling on the individual student's particular personal, academic, and vocational needs. Such guidance and counselling by teachers as well as professional guidance counsellors

shall be available to all students without regard to race or color.

(p) *Protection of Persons Exercising Choice.* Within their authority school officials are responsible for the protection of persons exercising rights under or otherwise affected by this decree. They shall, without delay, take appropriate action with regard to any student or staff member who interferes with the successful operation of the plan. Such interference shall include harassment, intimidation, threats, hostile words or acts, and similar behavior. The school board shall not publish, allow, or cause to be published, the names or addresses of pupils exercising rights or otherwise affected by this decree. If officials of the school system are not able to provide sufficient protection, they shall seek whatever assistance is necessary from other appropriate officials.

III.

PROSPECTIVE STUDENTS

Each prospective new student shall be required to exercise a choice of schools before or at the time of enrollment. All such students known to defendants shall be furnished a copy of the prescribed letter to parents, and choice form, by mail or in person, on the date the choice period opens or as soon thereafter as the school system learns that he plans to enroll. Where there is no pre-registration procedure for newly entering students, copies of the choice forms shall be available at the Office of the Superintendent and at each school during the time the school is usually open.

IV.

TRANSFERS

(a) *Transfers for Students.* Any student shall have the right at the beginning of a new term, to transfer to any school from which he was excluded or would otherwise be excluded on account of his race or color.

(b) *Transfers for Special Needs.* Any student who requires a course of study not offered at the school to which he has been assigned may be permitted, upon his written application, at the beginning of any school term or semester, to transfer to another school which offers courses for his special needs.

(c) *Transfers to Special Classes or Schools.* If the defendants operate and maintain special classes or schools for physically handicapped, mentally retarded, or gifted children, the defendants may assign children to such schools or classes on a basis related to the function of the special class or school that is other than freedom of choice. In no event shall such assignments be made on the basis of race or color or in a manner which tends to perpetuate a dual school system based on race or color.

V.

SERVICES, FACILITIES, ACTIVITIES AND PROGRAMS

No student shall be segregated or discriminated against on account of race or color in any service, facility, activity, or program (including transportation, athletics, or other extracurricular activity) that may be conducted or sponsored by or affiliated with the school in which he is enrolled. A student attending school for the first time on a desegregated basis may not be subject to any disqualification or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer or newly assigned student except that such transferees shall be subject to longstanding, non-racially based rules of city, county, or state athletic associations dealing with the eligibility of transfer students for athletic contests. All school use or school-sponsored use of athletic fields, meeting rooms, and all other school related services, facilities, activities, and programs such as Commencement exercises and parent-teacher meetings which are open to persons other than enrolled students, shall be open to all persons without regard to race or color. All special educational programs conducted by the defendants shall be conducted without regard to race or color.

VI.

SCHOOL EQUALIZATION

(a) *Inferior Schools.* In schools heretofore maintained for Negro students, the defendants shall take prompt steps necessary to provide physical facilities, equipment, courses of instruction, and instructional materials of quality equal to that provided in schools previously maintained for white students. Conditions of overcrowding, as determined by pupil-teacher ratios and pupil-classroom ratios shall, to the extent feasible, be distributed evenly between schools formerly maintained for Negro students and those formerly maintained for white students. If for any reason it is not feasible to improve sufficiently any school formerly maintained for Negro students, where such improvement would otherwise be required by this subparagraph, such school shall be closed as soon as possible, and students enrolled in the school shall be reassigned on the basis of freedom of choice. By October of each year, defendants shall report to the Clerk of the Court pupil-teacher ratios, pupil-classroom ratios, and per-pupil expenditures both as to operating and capital improvement costs, and shall outline the steps to be taken and the time within which they shall accomplish the equalization of such schools.

(b) *Remedial Programs.* The defendants shall provide remedial education programs which permit students attending or who have previously attended all-Negro schools to overcome past inadequacies in their education.

VII.

NEW CONSTRUCTION

The defendants, to the extent consistent with the proper operation of the school system as a whole, shall locate any new school and substantially expand any existing schools with the objective of eradicating the vestiges of the dual system and of eliminating the effects of segregation.

VIII.

FACULTY AND STAFF

(a) *Faculty Employment.* Race or color shall not be a factor in the hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff members, including student teachers, except that race may be taken into account for the purpose of counteracting or correcting the effect of the segregated assignment of teachers in the dual system. Teachers, principals, and staff members shall be assigned to schools so that the faculty and staff is not composed exclusively of members of one race. Wherever possible, teachers shall be assigned so that more than one teacher of the minority race (white or Negro) shall be on a desegregated faculty. Defendants shall take positive and affirmative steps to accomplish the desegregation of their school faculties and to achieve substantial desegregation of faculties in as many of the schools as possible for the 1967-68 school year notwithstanding

that teacher contracts for the 1966-67 or 1967-68 school years may have already been signed and approved. The tenure of teachers in the system shall not be used as an excuse for failure to comply with this provision. The defendants shall establish as an objective that the pattern of teacher assignment to any particular school not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school.

(b) *Dismissals.* Teachers and other professional staff members may not be discriminatorily assigned, dismissed, demoted, or passed over for retention, promotion, or rehiring, on the ground of race or color. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system shall be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If, as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system shall be evaluated in selecting the staff member to be released without consideration of race or color. A report containing any such proposed dismissals, and the reasons therefor, shall be filed with the Clerk of the Court, serving copies upon opposing counsel, within five (5) days after such dismissal, demotion, etc., as proposed.

(c) *Past Assignments.* The defendants shall take steps to assign and reassign teachers and other pro-

fessional staff members to eliminate past discriminatory patterns.

IX.

REPORTS TO THE COURT

(1) *Report on Choice Period.* The defendants shall serve upon the opposing parties and file with the Clerk of the Court on or before April 15, 1967, and on or before June 15, 1967, and in each subsequent year on or before June 1, a report tabulating by race the number of choice applications and transfer applications received for enrollment in each grade in each school in the system, and the number of choices and transfers granted and the number of denials in each grade of each school. The report shall also state any reasons relied upon in denying choice and shall tabulate, by school and by race of student, the number of choices and transfers denied for each such reason.

In addition, the report shall show the percentage of pupils actually transferred or assigned from segregated grades or to schools attended predominantly by pupils of a race other than the race of the applicant, for attendance during the 1966-67 school year, with comparable data for the 1965-66 school year. Such additional information shall be included in the report served upon opposing counsel and filed with the Clerk of the Court.

(2) *Report After School Opening.* The defendants shall, in addition to reports elsewhere described,

serve upon opposing counsel and file with the Clerk of the Court within 15 days after the opening of schools for the fall semester of each year, a report setting forth the following information:

(i) The name, address, grade, school of choice and school of present attendance of each student who has withdrawn or requested withdrawal of his choice of school or who has transferred after the start of the school year, together with a description of any action taken by the defendants on his request and the reasons therefor.

(ii) The number of faculty vacancies, by school, that have occurred or been filled by the defendants since the order of this Court or the latest report submitted pursuant to this subparagraph. This report shall state the race of the teacher employed to fill each such vacancy and indicate whether such teacher is newly employed or was transferred from within the system. The tabulation of the number of transfers within the system shall indicate the schools from which and to which the transfers were made. The report shall also set forth the number of faculty members of each race assigned to each school for the current year.

(iii) The number of students by race, in each grade of each school.

EXPLANATORY LETTER

(School System Name and Office Address)

(Date Sent)

Dear Parent:

All grades in our school system will be desegregated next year. Any student who will be entering one of these grades next year may choose to attend any school in our system, regardless of whether that school was formerly all-white or all-Negro. It does not matter which school your child is attending this year. You and your child may select any school you wish.

Every student, white and Negro, must make a choice of schools. If a child is entering the ninth or higher grade, or if the child is fifteen years old or older, he may make the choice himself. Otherwise a parent or other adult serving as parent must sign the choice form. A child enrolling in the school system for the first time must make a choice of schools before or at the time of his enrollment.

The form on which the choice should be made is attached to this letter. It should be completed and returned by June 1, 1967. You may mail it in the enclosed envelope, or deliver it by messenger or by hand to any school principal or to the Office of the Superintendent at any time between May 1 and June 1. No one may require you to return your choice form before June 1 and no preference is given for returning the choice form early.

No principal, teacher or other school official is permitted to influence anyone in making a choice or to require early return of the choice form. No one is permitted to favor or penalize any student or other person because of a choice made. A choice once made cannot be changed except for serious hardship.

No child will be denied his choice unless for reasons of overcrowding at the school chosen, in which case children living nearest the school will have preference.

Transportation will be provided, if reasonably possible, no matter what school is chosen. [Delete if the school system does not provide transportation.]

Your School Board and the school staff will do everything we can to see to it that the rights of all students are protected and that desegregation of our schools is carried out successfully.

Sincerely yours,

Superintendent.

CHOICE FORM

This form is provided for you to choose a school for your child to attend next year. You have 30 days to make your choice. It does not matter which school your child attended last year, and does not matter whether the school you choose was formerly a white or Negro school. This form must be mailed or brought

to the principal of any school in the system or to the office of the Superintendent, [address], by June 1, 1967. A choice is required for each child.

Name of child .....
(Last) (First) (Middle)

Address .....

Name of Parent or other
adult serving as parent .....

If child is entering first grade, date of birth:

.....
(Month) (Day) (Year)

Grade child is entering .....

School attended last year .....

Choose one of the following schools by marking an X beside the name.

Name of School	Grade	Location
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

Signature .....
Date .....

.....
.....

To be filled in by Superintendent:
School Assigned .....[1]

[1] In subsequent years the dates in both the explanatory letter and the choice form should be changed to conform to the choice period.

APPENDIX B.

Rate of Change and Status of Desegregation

(Leeson, Faster Pace, Scarcer Records, Southern Education Report 28-32 (Jan.-Feb. 1966), quoted in Emmerson and Huber, Political and Civil Rights in the United States, 695-99 (1967))

". . . Both the 11-state Southern area and the border area, the latter consisting of six states and the District of Columbia, experienced a sharper increase in the percentage of Negroes in desegregated schools for 1965-66 than in previous years. But only the Southern states showed a changed attitude toward reporting records by race; in only three Southern states could nearly complete statistics be obtained district by district. As in other years, three of the border states plus the District of Columbia continued to keep records by race, and three states did not.

Correspondents for Southern Education Reporting Service . . . found that 15.89 per cent of the Negroes enrolled in the public schools of the region attended classes with whites, mostly in formerly all-white schools but sometimes also in formerly all-Negro schools. This numbered 567,789 Negro students out of the region's Negro enrollment of 3,572,810.

In the first 10 years after the Supreme Court decisions on segregated schools, in 1954 and 1955, the

Southern and border region increased the number of Negroes in schools with whites at an average of about one per cent a year. Although the impetus of the Supreme Court's rulings and the possibility of direct involvement in legal action were factors, most districts desegregating through last year acted "voluntarily" and only about 10 per cent required a specific court order. By the end of the 1964-65 school year, the region had enrolled 10.9 per cent of its Negro students in biracial classrooms.

The 1964 Civil Rights Act brought pressure on every district in the nation but the compliance effort admittedly was concentrated on the South. . . . Beginning in the spring of 1965 and continuing even through the first months of the 1965-66 school year, HEW's Office of Education negotiated with officials in each district to obtain compliance by the school officials either signing a statement, submitting a court-ordered desegregation plan or adopting a voluntary plan.

With the new school year, the region had increased the number of Negroes in desegregated schools by five percentage points to reach 15.9 per cent, while in the previous two school years the rate of increase in this figure had only been between one and two percentage points. For 1964-65, the region had 10.9 per cent of the Negro enrollment in desegregated schools, an increase of 1.7 percentage points over 1963-64, and for that year the 9.2 per cent figure was an increase of 1.2 percentage points over 1962-63. (*See Table* I.) . . .

TABLE I

The Rate of Change

Percentage of Negroes in Schools with Whites

School Year	*South*	*% Change*	*Border*	*% Change*	*Region*	*% Change*
1959-60*	.160		45.4		6.4	
1960-61	.162	.002	49.0	3.6	7.0	.6
1961-62	.241	.079	52.5	3.5	7.6	.6
1962-63	.453	.212	51.8	0.7	8.0	.4
1963-64	1.17	.717	54.8	3.0	9.2	1.2
1964-65	2.25	1.08	58.3	3.5	10.9	1.7
1965-66	6.01	3.76	68.9	10.6	15.9	5.0

* First school year in which SERS began recording number of Negroes in schools with whites.

Up through the 1962-63 school year, the 11 Southern states together had fewer than one per cent of their Negro students in schools with whites. In 1963-64, the figure passed the one per cent mark and it almost doubled for 1964-65 to become 2.25 per cent of the Negroes in biracial schools, an increase of more than one percentage point. For the 1965-66 school year, the percentage more than doubled and reached 6.01 per cent.[1]

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[1] Other estimates are summarized in Report of the United States Commission on Civil Rights, Survey of School Desegregation in the Southern and Border States 1965-1966, 27-28 (Feb. 1966)

". . . The Office of Education based on a sampling of 590 districts through a telephone survey conducted in cooperation with State departments of education, estimates that 216,000, or 7.5 percent, of the Negro students in the 11 Deep South States are enrolled in school this year with white pupils. [Office of Education, telephone survey, Table I, Sept. 27, 1965.] Civil rights organizations, relying upon figures obtained from a variety of sources, including field workers, advance a lower figure. The Southern Regional Council's estimate is 151,416 Negro pupils, or 5.23 percent of the total. [Southern Regional Council, 'School

The six border states and the District of Columbia desegregated at a faster rate than did the South, and by the 1961-62 school year that area had more than half of its Negro enrollment attending desegregated schools. The annual change in the number of Negroes in desegregated border schools averaged about three per cent a year, and by 1964-65, the border area had desegregated 58.3 per cent of its Negro enrollment. In the current school year, the border area has 68.9 per cent of its Negro students attending the same schools with whites, a jump of over 10 percentage points from the previous year's figure.

This year, as in previous years, a disparity exists between what might be called "technical" desegregation and "actual" desegregation. Last year, for example, 56 per cent of the region's Negro students were enrolled in districts having desegregation policies, but about 11 per cent of the total Negro enrollment attended desegregated schools. This year, the region has 97 per cent of its districts in official compliance with federal desegregation regulations, and 93 per cent of the region's combined Negro and white enrollment comes from these districts. However, the actual attendance of Negroes in desegregated schools amounts to almost 16 per cent. The difference in these figures was accentuated this year by the fact that almost 2,000 school districts having either all-

Desegregation: Old Problems Under a New Law' 9, Sept. 1965.] The American Friends Service Committee and NAACP Legal Defense and Educational Fund agree that the actual figure is less than 6 percent [American Friends Service Committee and NAACP Legal Defense and Educational Fund, 'Report on the Implementation of Title VI of the Civil Rights Act of 1964 in Regard to School Desegregation' 4, Nov. 15, 1965]."

white or all-Negro enrollments are included in the "in compliance" statistics. . . .

Among the Southern states, Texas leads in the number and percentage of Negroes in schools with whites —an estimated 60,000 Negroes or 17 per cent of the state's Negro enrollment. Tennessee ranks second in the area with 16 per cent and Virginia third with 11 per cent. Three states—Alabama, Louisiana, and Mississippi—continue to have less than one per cent of their Negro enrollment attending schools with whites. The other Southern states—Arkansas, Florida, Georgia, North Carolina and South Carolina—vary between 1 and 10 per cent of their Negro students in biracial classrooms.

All but one of the border states have more than half of their Negro enrollments in desegregated schools. Oklahoma has 38 per cent of its Negroes in biracial schools, Maryland has 56 per cent, and Delaware, the District of Columbia, Kentucky, . . . Missouri and West Virginia have desegregated more than three-fourths of their Negro student population. . . .

The desegregation statistic showing the sharpest increase this year was the number of districts with desegregation policies. The region now has 4,804 public school districts that have received approval from the U. S. Office of Education for their desegregation proposals. When the last school year ended, SERS reported that 1,476 districts had desegregated in practice or in policy.

TABLE III

Status of Desegregation

(17 Southern and Border States and D.C.)

	School Districts				*Enrollment*		*Negroes in Schools with Whites*	
	Total	*With Negroes and Whites*	*In Compliance*†	*Not In Compliance*†	*White*	*Negro*	*No.*	*%*††
Alabama	118	119	105	14	559,123**	295,848**	1,250*	.43
Arkansas	410	217	400	10	337,652**	111,952**	4,900*	4.38
Florida	67	67	67	0	1,056,805*	256,063*	25,000*	9.76
Georgia	196	180	192	5	784,917*	355,950*	9,465*	2.66
Louisiana	67	67	33	34	483,941	318,651	2,187	.69
Mississippi	149	149	118	31	309,413	296,834	1,750*	.59
North Carolina	170	170	165	4	828,638**	349,282**	18,000*	5.15
South Carolina	108	108	86	21	374,007	263,983	3,864	1.46
Tennessee	152	129	149	2	714,241*	176,541*	28,801	16.31
Texas	1,325	850	1,303	7	2,136,150*	349,192*	60,000*	17.18
Virginia	130	127	124	12	757,037**	239,729**	27,550*	11.49
SOUTH	2,892	2,183	2,742	140	8,341,924	3,014,025	182,767	6.01
Delaware	58	47	59	0	86,041	20,485	17,069	83.32
Dist. of Columbia	1	1	1	0	15,173	128,843	109,270	84.81
Kentucky	200	167	204	0	713,451**	59,835**	46,891	78.37
Maryland	24	23	24	0	583,796	178,851	99,442	55.60
Missouri	1,096	212*	675	0	843,167	105,171	79,000*	75.12
Oklahoma	1,046	323	1,044	4	564,250*	45,750*	17,500*	38.25
West Virginia	55	44	55	0	425,087*	19,850*	15,850*	79.85
BORDER	2,480	817	2,062	4	3,230,965	558,785	385,022	68.90
REGION	5,372	3,000	4,804	144	11,572,889	3,572,810	567,789	15.89

* Estimated.
** 1964-65.
† The sum of adding the districts "In Compliance" and "Not in Compliance" will not always equal the total number of districts because the Office of Education reports a different number of districts from that of some of the state departments of education.
†† The number of Negroes in schools with whites, compared to the total Negro enrollment.

COX, District Judge, dissenting:

The majority opinion herein impels my dissent, with deference, to its general theme, that precedent required the public schools to mix the races rather than desegregate such schools by removing all effects of state action which may have heretofore compelled segregation, so as to permit these schools to be operated upon a proper free choice plan. This Court has heretofore firmly and soundly (as decision and not gratuitously) committed itself to the views expressed by the distinguished jurists in *Briggs v. Elliott,* 132 F. Supp. 776. The majority now seeks to criticize the *Briggs* case and disparage it as dictum, although this Court in several reported decisions has embraced and adopted *Briggs* with extensive quotations from it as the decisional law of this Circuit. Surely, only two of the judges of this Court may not now single-handedly reverse those decisions and change such law of this Circuit.

These school cases all stem from the decision of the Supreme Court of the United States in the familiar *Brown* cases.[1] Nothing was said in those cases or has since been said by the Supreme Court to justify or support the extremely harsh plan of enforced integration devised by the majority decision. Signifi-

[1] Brown I *Brown v. Board of Education of Topeka,* 347 US 483, 74 S.Ct. 686, 98 L.Ed. 873.
Brown II *Brown v. Board of Education of Topeka, Kansas,* 349 US 294, 75 S.Ct. 753, 99 L.Ed. 1083.

On December 6, 1965 in *Patricia Rogers, et al v. Edgar F. Paul, et al,* 382 US 198, 86 S.Ct. 358, the Court decried delays in desegregation of public schools and called for an acceleration of the process, but neither said nor intimidated the existence of any power or the justification for any authority to forcefully mix or integrate these schools.

cantly, there is nothing in the Civil Rights Act of 1964 to suggest the propriety of this Court adopting and following any guidelines of the Health, Education and Welfare Commissioner in these school desegregation cases in such respect. The policy statement of Congress as contained in the act itself expressly disclaims any intention or purpose to do that which these guidelines, and the majority opinion approving them, do in complete disregard thereof.

No informed person at this late date would now argue with the soundness of the philosophy of the *Brown* decision. That case simply declared the constitutional right of negro children to attend public schools of their own free choice without any kind of restraint by state action. That Court has made it clear that the time for "deliberate" speed in desegregating these public schools has now expired, but the majority opinion herein is the first to say that the *Brown* case, together with the Civil Rights Act of 1964, makes it necessary that these public schools must now integrate and mix these schools and their facilities, "lock, stock and barrel." That view comes as a strange construction of the Fourteenth Amendment rights of colored children. The passage of time since the rendition of the *Brown* case; and of natural disparities which are found in so many school plans before the Court; and the difficult problems posed before the Court by such plans certainly can provide no legal justification or basis for this extreme view and harsh and mailed fist decision at this time. These questions involving principles of common sense and law are

readily resolved by a court of equity without being properly accused of giving an advisory opinion. The decision in such case is not overtaxing on a court of equity and its articulated conclusions can be implemented by an enforceable decree even at the expenditure of some well spent time, patience and energy of the Court. If a Court is to write a decree, it should be the decree of that Court and not the by-product of some administrative agency without knowledge or sworn obligation to resolve sacred constitutional rights and principles. Unilaterally prepared guidelines allegedly devised by the Commissioner may or not accord with his own views, but such an anomalously prepared document could not justify this Court in adopting it "lock, stock and barrel" under any pretext and even with repeated disavowals of such intention or purpose.

The Constitution of the United States is not the dead hand of the past strangling the liberties of a free people; it is a living document designed for all time to perpetuate liberty, freedom and justice for every person, young or old, who is born under or who comes within its protecting shield. As was said many years ago, "in moving water there is life, in still waters there is stagnation and death." The Constitution was framed not for one era, but for all time. But when the Courts transform viability into elasticity, constitutional rights are illusory. The rope of liberty may be twisted and become a garrote which strangles those who seek its protection. If the majority opinion in these cases is permitted to stand, it will, in the name

of protecting civil rights of some, destroy civil rights and constitutional liberties of all our citizens, their children and their children's children.

The Supreme Court, in *Brown II,* said that "school authorities have the primary responsibility for elucidating, assessing and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles." It thereupon became the duty of the Court, acting as a Court of Equity, under such principles to see that public schools, still operating under the dual system by state action, were *desegregated* (not integrated) in accordance with the vested constitutional right of colored children. Judicial haste and impatience cannot justify this Court in equating integration with desegregation. No Court up to this time has been heard to say that this Court now has the power and the authority to force integration of both races upon these public schools without regard to any equitable considerations, or the will or wish of either race. The decisions of this Court deserve and must have stability and integrity. It was the 1965 guidelines of HEW that were approved by this Court in *Derek Jerome Singleton v. Jackson Municipal Separate School District,* 255 F.2d 865. Judge Wisdom wrote for the Court and Judge Thornberry concurred in that case on January 26, 1966; and there was not a word in that case to the effect that this Court then thought that any decision or statute or guidelines under any statute required or justified *forced integration.* Almost before that slip

opinion reached the bound volume, this Court has now written on December 29, 1966, a vastly different opinion with no change intervening in the law.

The last reported school case from this Circuit, decided August 16, 1966 by Judge Tuttle and Judge Thornberry in *Birdie Mae Davis, et al v. Board of School Commissioners of Mobile County, et al,* 364 F.2d 896, this Court still wrote of accelerating a plan of *desegregation.* As if to foreshadow the point of Judge Wisdom's "nettle" in the majority opinion in this case, Judge Tuttle wrote in his Note 1 an explanation of his changing requirements in these school cases for the delayed enjoyment of constitutional rights by accelerating *desegregation.* Davis said that negro children, as individuals, had the right to transfer to schools from which they were excluded because of their race, and said that this had been the law since the *Brown* decision; but that misunderstanding of that principle was perhaps due to the popularity "of an oversimplified dictum that the Constitution does not require integration. Briggs v. Elliott, 132 F. Supp. 776, 777." That is the first and only expressed criticism of Briggs found among the decisions of this Circuit, but the Court did not comment upon the viability and soundness of the many decisions of this Circuit which wholeheartedly embraced and repeatedly reaffirmed the so-called dicta in *Briggs. Davis* dealt with an urban area in Mobile, Alabama, while these cases deal with small communities or rural schools but that could have no possible bearing on desegregation versus or as distinguished from immediate forced integration or mixing of these schools.

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In *Alfred Avery, Jr., a Minor by his Mother and Next Friend, Mrs. Alfred Avery, et al v. Wichita Independent School District, et al,* 241 F.2d 230 (1957), this Court said:

"The Constitution as construed in the School Segregation Cases, Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; Id., 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, and Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884, forbids any state action requiring segregation of children in public schools solely on account of race; it does not, however, require actual integration of the races. As was well said in Briggs v. Elliott, D.C.E.D.S.C., 132 F. Supp. 776, 777:

"* * * it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different

churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals."

Again, this Court in *Hilda Ruth Borders, a Minor, et al v. Dr. Edwin L. Rippy, et al,* 247 F.2d 268 (1957) said: "The equal protection and due process clauses of the Fourteenth Amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools. Avery v. Wichita Falls Independent School District, 5 Cir., 1957, 241 F.2d 230, 233. Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or for any other legitimate reason, but each child is entitled to be treated as an individual without regard to his race or color."

In a public housing case, participated in by Judge Wisdom, *Queen Cohen v. Public Housing Administration,* 257 F.2d 73, it is said: "Neither the Fifth nor the Fourteenth Amendment operates positively to command integration of the races, but only negatively to forbid governmentally enforced segregation."

This Court in *Sandra Craig Bcson, et al v. Dr. Edwin L. Rippy, et al,* 285 F.2d 43, said: "Indeed, *this Court has adopted the reasoning* in Briggs v. Elliott, DC.E.D.S.C. 1955, 132 F. Supp. 776, relied on by the Sixth Circuit, and has further said: 'The equal protection and due process clauses of the fourteenth amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools. Avery v. Wichita Falls Independent School District, 5 Cir., 1957, 241 F.2d 230, 233. Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or for any other legitimate reason, but each child is entitled to be treated as an individual without regard to his race or color.' Borders v. Rippy, 5 Cir., 1957, 247 F.2d 268, 271.

"Nevertheless, with deference to the views of the Sixth Circuit, it seems to us that classification according to race for purposes of transfer is hardly less unconstitutional than such classification for purposes of original assignment to a public school." It is that decision in *Briggs v. Elliott, supra,* which the majority here now seek to criticize and repudiate.

In *Ralph Stell, et al v. Savannah-Chatham County Board of Education, et al,* (5CA) 333 F.2d 55, 59, in footnote 2 it is said: "No court has required a 'compulsory racially integrated school system' to meet the constitutional mandate that there be no discrim-

ination on the basis of race in the operation of public schools. See Evers v. Jackson Municipal Separate School District, 5 Cir., 1964, 328 F.2d 408, and cases there cited. The interdiction is against enforced racial segregation. Incidental integration, of course, occurs through the process of desegregation. Cf. Stone v. Board of Education of Atlanta, 5 Cir., 1962, 309 F.2d 638."

This Court in *Darrell Kenyatta Evers, et al v. Jackson Municipal Separate School District,* 328 F.2d 408 (1964) said: "This is not to say that the Fourteenth Amendment commands integration of the races in the schools, or that voluntary segregation is not legally permissible. See Avery v. Wichita Falls Ind. School Dist., 5 Cir., 1957, 241 F.2d 230; Rippy v. Borders, 5 Cir., 1957, 250 F.2d 690; Cohen v. Public Housing Administration, 5 Cir., 1958, 257 F.2d 73, cert. den., 358 U.S. 928, 79 S.Ct. 315, 3 L.Ed. 2d 302; Holland v. Board of Public Instruction, supra; and Shuttlesworth v. Birmingham Board of Education, supra. The Supreme Court did not hold otherwise in Brown v. Board of Education, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873." The same teaching is expressed in a park case from this Court, styled *City of Montgomery, Alabama v. Georgia Theresa Gilmore,* 277 F.2d 364. In the many cases from this Court involving the race issue in public schools (there being some forty-one of them according to the majority opinion), not one of them speaks of any requirement or duty of the school to forcefully integrate the races, or to compel the races to mix with each other in public schools; but every

one of them speak of *desegregating* such schools. The word desegregate does not appear in Webster's New International Dictionary, Second Edition, Edited in 1950. But Webster's New Collegiate Dictionary (a Merriam-Webster) defines *desegregation* as: "To free itself of any law, provision or practice requiring isolation of the members of a particular race in separate units, especially in military service or in education."

In sum, there is no law to require one of these public schools to integrate or force mix these races in public schools. But these public schools, which have been heretofore segregated by state action, and operate under a dual system, should be required to remove every vestige of state influence toward segregation of the races in these schools; and these colored children should be fully advised of their constitutional right to attend public schools of their choice, completely without regard to race. Many problems exist and are created by the proper enforcement of desegregation plans that will assure a full sweep of real freedom of choice to these negro children, and this Court cannot by only two of its members become impatient as trail-blazers and rewrite the decisional law of this Circuit as my good friends have undertaken to do in this case.

Such a course would do violence to the ancient rule of Stare Decisis. In *Donnelly Garment Co. v. National Labor Relations Board*, (8CCA) 123 F.2d 215: "It is a long-established rule that judges of the same court

will not knowingly review, reverse or overrule each other's decisions. Shreve v. Cheesman, 8 Cir., 69 F. 785, 790, 791; Plattner Implement Co. v. International Harvester Co., 8 Cir., 133 F. 376, 378, 379. The necessity of such a rule in the interest of an orderly administration of justice is clear." In *Sanford Napoleon Powell v. United States,* (7CA) 338 F.2d 556 (1964), it is said: "Our decision in Lauer has been criticized. However, this decision is the law of this Circuit unless and until this Court (presumably sitting en banc) would determine otherwise or unless higher authority might so determine."

Rule 25(a) of the Fifth Circuit provides for a rehearing in any case upon vote of a majority of the circuit judges in active service for any reason which appears to them to be sufficient in the particular case. Ordinarily, a hearing or rehearing en banc is not ordered except "when necessary to secure or maintain uniformity or continuity in the decisions of the court, etc." The majority opinion simply does not reflect the well considered and firmly stated composite decision of this Circuit; and in that view, is not an accurate or proper statement of the law in this case as it now exists in the Fifth Circuit.

The Civil Rights Act of 1964 (42 U.S.C., 1958 ed., §2000c-6) refers to "desegregation in public education" and not to forced mixing or integration of the races. That same section states "provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve

a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." The English language simply could not be summoned to state any more clearly than does that very positive enactment of Congress, that these so-called "guidelines" of this administrative agency are not sacrosanct expositions of school law (if so intended), but are actually promulgated and being used in opposition to and in violation of this positive statute. Contrary to the majority opinion, it was never the intention or purpose of the Congress to constitute the Commissioner of Health, Education and Welfare as the sidewalk superintendent of this Court in these school cases. On the contrary, 42 U.S.C., 1958 ed., §2000c-2 provides that the Commissioner, *only upon application* of a *school board, state, municipality, school district* or *other governmental unit,* can render any technical assistance to such an applicant. Nowhere in that act is it contemplated that this court should abdicate its power and authority to act upon and decide a case on appeal to it as a court of equity, and simply decide it by rubber stamping one of the annual guideline bulletins of an administrative bureau of the United States in Washington. The attitude and position of this Court in doing exactly that in this case is not improved by disavowing any intention or purpose to do so.

There were seven consolidated cases before the Court which are embraced in this decision. Most, if not all, of the plans in those cases were defective and needed updating for a more realistic and effective application of the free choice principle under the former decisions of this Court; but they did not need or deserve the harsh and unprecedented treatment accorded these schools by the majority decision in these cases. The colored children are not befriended and their lot is not improved by this unprecedented majority opinion and the entire school system will suffer under the impact of this improvident administrative directive as thus adopted by this Court.

My duty impels me to file this DISSENT to the majority view in these cases with great deference to both of my distinguished associates.

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23,345
UNITED STATES, *et al.*,
Appellants,
vs.
JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,
Appellees.

No. 23,331
UNITED STATES, *et al.*,
Appellants,
vs.
FAIRFIELD BOARD OF EDUCATION, *et al.*,
Appellees.

No. 23,274
UNITED STATES, *et al.*,
Appellants,
vs.
CADDO PARISH SCHOOL BOARD, *et al.*,
Appellees.

No. 23,335
UNITED STATES, *et al.*,
Appellants,
vs.
BOARD OF EDUCATION OF THE CITY OF BESSEMER, *et al.*,
Appellees.

No. 23,116
DAVIS, *et al.*,
Appellants,
vs.
EAST BATON ROUGE PARISH SCHOOL BOARD, *et al.*,
Appellees.

No. 23,365
UNITED STATES, *et al.*,
Appellants,
vs.
BOSSIER PARISH SCHOOL BOARD, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN AND SOUTHERN DISTRICTS OF ALABAMA, AND EASTERN AND WESTERN DISTRICTS OF LOUISIANA

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Appellants,

vs.

EAST BATON ROUGE PARISH SCHOOL BOARD, *et al.*,

Appellees.

No. 23,331

UNITED STATES, *et al.*,

Appellants,

vs.

FAIRFIELD BOARD OF EDUCATION, *et al.*,

Appellees.

No. 23,335

UNITED STATES, *et al.*,

Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF BESSEMER, *et al.*,

Appellees.

No. 23,365

UNITED STATES, *et al.*,

Appellants,

vs.

BOSSIER PARISH SCHOOL BOARD, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN AND SOUTHERN DISTRICTS OF ALABAMA, AND EASTERN AND WESTERN DISTRICTS OF LOUISIANA

BRIEF ON REHEARING FOR INTERVENORS AND APPELLANTS

Statement

This consolidated Brief on Reargument is submitted on behalf of the Negro pupils and parents who, as private parties plaintiff, initiated these six school desegregation suits involving the public schools of the cities of Bessemer, and Fairfield, Alabama, Jefferson County, Alabama, and Caddo, Bossier, and East Baton Rouge Parishes in Louisiana. In each of the cases, except No. 23,116, *Davis* v. *East Baton Rouge Parish School Board,* the United States of America intervened as a party plaintiff and appealed from a district court order approving a proposed desegregation plan. The private plaintiffs in these cases were permitted to intervene as appellants in this Court. In the *Davis* case, *supra,* the appeal from a district court order approving a desegregation plan was taken by the private plaintiffs.

Several briefs have been submitted before and after the original arguments in these cases. However, in order that the entire Court may have access to a statement of the proceedings and facts in each case, in a single volume, we restate them below. The opinion of the panel of this Court which decided the cases on the original arguments stated that the Court had "carefully examined each of the records" and that: "In each instance the record supports the decree" (Slip Opinion, p. 111). We agree.

I. *No. 23,335, United States, et al. v. Board of Education of the City of Bessemer*

The complaint in this action was filed by Negro students and parents on May 24, 1965, to desegregate the public schools of Bessemer, Alabama (R. 11-19). The City of Bessemer maintained ten schools for the 5,286 Negro and 2,920 white pupils enrolled during the school year 1964-65

(R. 100). The system has 1 white high school (grades 10-12), 1 white junior high school (grades 7-9), 4 white elementary schools (grades 1-6), 2 Negro schools offering grades 1-12, and 2 Negro schools offering grades 1-8 (R. 95-97).

The procedures in the Bessemer desegregation plan presently before this Court adopt with minor modifications pupil assignment procedures utilized by the Bessemer board prior to the plan to maintain a rigidly segregated public school system. Detailed descriptions of these assignment procedures, of other aspects of the system, and of the approved plan follow:

A. Pupil Assignment Policy

Bessemer maintained a dual system of schools, "one set of schools for Negroes and one set for whites," at the time this action was filed (R. 116). One map sets out the attendance zones for each of the 4 Negro schools (R. 95) and a second map sets out zones for each of the white schools (R. 96). When asked at the hearing below if the racial zone maps were "being used at the present time," the Superintendent responded: "To the best of my knowledge, we are still following these maps" (R. 98). Counsel for the board asked that these maps be withdrawn from the court at the conclusion of the hearing because "Dr. Knuckles has told us these are maps we need constantly" (R. 99).

The board also maintained a map showing the residence and race of each student and location of each of the schools within the system, with "red dots showing the location . . . of the Negro pupils" and "green dots indicating the residential location of the white pupils enrolled in school during this year" (R. 105-106).

The superintendent testified that the school system "is geared to placing students in schools that are closest to their neighborhood" (R. 108). Yet, adherence to a policy of strict separation of the races in the schools did not always result in students being so assigned. Superintendent Knuckles further testified:

> Q. Do you have very many students who are at the present time passing by schools which are closest to their neighborhood? A. I am sure we have some.
>
> Q. Do you have any of your white students . . . who are passing by Negro schools to go to white schools? A. I expect there are some.
>
> Q. And vice versa? A. And vice versa, yes sir. (R. 108-109)

Some students were required to pass a school maintained for children of the opposite race and "cross a railroad track and some more than one railroad track" to reach a school maintained for their race (R. 159).

School zone lines were changed periodically as conditions changed, and in some instances the superintendent and the board "have administratively transferred the pupils who live in a particular area from one school to another as the school was built or as a school was added to or particular facilities were abandoned" (R. 146). The superintendent testified that when a particular zone contained more students than the school could accommodate "we just had to arbitrarily assign them to another school" (R. 147).

Through this system of assignments the schools within the City of Bessemer were kept completely segregated. No white students attended Negro schools and no Negroes attended white schools (R. 28).

B. The Plan Approved by the Court Below

On July 30, 1965, the court below entered an order approving with minor modifications the first plan submitted by appellees (R. 64-66). An appeal was taken from that order and on August 17, 1965, this Court vacated the judgment and remanded for further consideration, *United States* v. *City of Bessemer Board of Education,* 349 F.2d 1021 (5th Cir. 1965) (R. 71-72). Thereafter, appellees filed an amended plan (R. 81-84) which was approved by the court below on August 27, 1965 (R. 85-86). The amended plan is the subject of this appeal.

The plan adopts the racial assignment policy based upon a dual set of zones described above, subject to minor modifications. Initially, pursuant to the plan, "all pupils in all grades of the Bessemer system will remain assigned to school to which they are assigned or will be assigned to schools in accordance with the custom and practice for assignment of pupils that have prevailed in the school system prior to the entry of the judgment of the District Court in this case on June 30, 1965, such method of assignment being necessary in order to prevent a disruption of the school system and to maintain an orderly administration of the schools in the interests of all pupils" (R. 45-46).

Students entering the first grade are specifically required to report to the elementary school located in the zone *maintained for their race*—Negro students reporting to Negro schools and white students reporting to white schools (R. 44). Only after this segregated racial assignment procedure may "an application may be made by the parents for the child's assignment to any school (whether formerly attended only by white children or only by Negro children)" (R. 44).

Similarly, students in all other grades are initially assigned to segregated schools maintained by appellees for

students of their race (R. 45).[1] Once assigned to these schools, students in grades 1, 4, 7, 10 and 12 during the school year 1965-66, students in grades 2, 3, 8 and 11 during the school year 1966-67, and students in grades 5, 6 and 9 during 1967-68 may apply for transfer "to a school heretofore attended only by pupils of a race other than the race of the pupils in whose behalf the applications are filed" (R. 43-44, 88-83). Transfer forms must be picked up, completed, and returned to the superintendent's office during the designated transfer period (R. 82).

Transfer applications will thereafter "be processed and determined by the board pursuant to its regulations as far as is practicable" (R. 44).[2] No regulations were ever introduced, and on cross-examination the superintendent was unable to say what regulations were referred to by

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[1] Q. Am I correct that the plan in essence will assign particular schools on the basis of race? A. Most of the pupils in Bessemer with the exception of the first graders are presently assigned to schools they are enrolled in and their records are there.

Q. Even in the grades you are desegregating you contemplate they will attend the school that heretofore has been for their race unless a transfer application is filed and approved? A. That is correct. (R. 264)

[2] Prior to the adoption of the plan and the possibility of desegregation of the schools, the board liberally granted transfers.

> Q. Is it fair to say you granted that request more or less as a matter of course as long as there was capacity in the school to which they were transferring? A. I think that is true. We attempted to accomodate people where we didn't overburden the school, the classes or the teachers. (R. 148)
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> * * *
>
> Q. Mr. Knuckles, you have testified in answer to some of my questions about transfers from one zone to another. Have they been initiated normally by either a letter or a telephone call? A. Yes, sir.
>
> Q. No particular form being used? A. No form.
>
> Q. And there has been no time limit for submitting them to the board? A. No, but I did tell you we have discouraged transfer during the school year.
>
> Q. After school is started? A. Yes, sir.

the plan or their subject, except that they were "general regulations under which we have operated for a long time" (R. 260).

The above described transfer requirements do not apply to Negro students applying for transfers from one Negro school to another Negro school or to white students applying for a transfer from one white school to another white school.

> The Court: I think this plan after the first paragraph only refers in cases where Negro pupils apply to transfer to schools heretofore attended only by white pupils in these classes and vice versa. I think that is the plan.
>
> Q. Is that the way you expect to administer the plan? A. Yes, sir.
>
> Q. So that procedure will be used only when a Negro applies to attend a white school or a white applies to attend a previous Negro school? A. In these grades. (R. 261)

Students new to the system are similarly assigned on the basis of race.[3] The plan is silent and the board is undecided on how applications to overcrowded schools will be processed.

> Q. If a Negro child applies for the Bessemer Junior High School [a white school] in the seventh grade, a

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[3] A. They will appear at a school to enroll and will abide by the same regulations. If a child asks to transfer to the school of another race and it is after the deadline date, I would assume that he, like other children who let the deadline pass for this time, just wait until his grade is open at another time.

Q. Dr. Knuckles, a white child moving into the school district and is due to enter the seventh grade will automatically go into the seventh grade without making out any papers at all in a white school? A. A Negro child would do the same thing in a Negro school. We are proposing in this instance to follow the custom that has been followed for some time in the interim period. (R. 265)

desegrated [sic] grade, and lives closer to Bessemer Junior High School than white children who will seek enrollment in the Junior High School, is there any decision which will have priority under the plan? Which will have priority if there isn't room for both? A. That question has not been determined.

Q. You don't know? A. That is correct.

Under the plan students will not be permitted to transfer from a school to which they are racially assigned to a school maintained for children of the other race to take a course not offered at their school unless the student is enrolled in a grade reached by the plan.[4]

The plan provides for notice through publication in a local newspaper. No individual notices are contemplated (R. 266).

C. Faculty and Administrative Assignments

The plan makes no provision for non-racial faculty assignments.

The board employs 285 classroom teachers, 175 Negro and 110 white (R. 115). For the 1964-65 school year the board had a teacher turnover rate of 11.85% (R. 119). The superintendent testified that all Negro teachers in the system have met the minimum requirements of the board and that they possessed "the same or similar qualifications as . . . white teachers" (R. 122, 123).

The faculty remains totally segregated with Negro teachers instructing Negro students and white teachers

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[4] Q. And it [the transfer application] will be considered even though the child is in a grade that has not yet been reached by the plan? A. I think we will live with and operate under the provisions laid out in this plan during this interim period.

Q. And that is your answer to that question? A. Yes, sir. (R. 267)

instructing whites (R. 120). The board has considered desegregating the faculty but has not reached a conclusion "simply because the request had not come from parents at the time for the assignment of Negro children to schools other than those they were attending" (R. 118-119).

Teachers were freely assigned by the board when such transfers met the administrative convenience of the district. "[W]e had three rooms in this small school and we closed them and moved the children to one of the larger schools and moved the teachers and consequently we saved the operational cost of that building" (R. 244).

Faculty meetings are held on a segregated basis (R. 251). Administrative and supervisory staff is also segregated. Of 10 administrators employed by the board, 9 are white. The one Negro administrator is in charge of Negro schools (R. 116) and is provided an office apart from the other administrators in a Negro school. No Negroes work in the central office (R. 118).

D. Inequality

The record contains many examples of the inequality between Negro and white schools, including:

1. *Pupil-Teacher Ratios* (R. 162-164):

Negro High Schools	*White High School*
Carver 25 "plus"/1	Bessemer H. S. 19.08/1
Abrams 25/1	

2. *Library Books per Pupil* (R. 164-165):

Abrams 8/1	Bessemer H. S. 19.08/1
Carver 3.17/1	

3. *Elective Subjects Offered in High Schools*

The superintendent admitted that more electives were offered in the white than the Negro high school but attributed this disparity to "community pressure" (R. 166). Latin, Spanish, and two years of French are offered in the white high school; the only language taught in the Negro high school is one year of French. Journalism is taught in the white but not the Negro schools (R. 167-168, 229, 233-234).

The plan makes no provision for equalizing the facilities between Negro and white schools.

E. School Construction

The Bessemer school district contemplates expending approximately $460,000 for rebuilding or adding to existing segregated facilities (R. 125). The plan makes no provision to require that a rebuilding program be designed so as to aid in abolishing the dual system.

F. Other Matters

The plan contains no provisions for individual notice to pupils, no provision with respect to locating new school buildings or additional facilities in such a manner as to eliminate segregation, no provisions with respect to nondiscrimination in various school connected or sponsored activities or in extracurricular activities, and no provisions with respect to periodic reports to the court concerning desegregation.

G. Administration of the Plan

In the first year of the plan, 1965-66, only 13 of approximately 5,284 Negroes attended formerly white schools. (Affidavit of St. John Barrett attached to Motion to Con-

solidate and Expedite Appeals in these cases, filed in this Court April 4, 1966.) In the second year of the plan, the current 1966-67 term, about 64 Negro pupils attend formerly white schools. (Information supplied to intervenors and appellants by U. S. Department of Health, Education and Welfare.)

II. *No. 23,345, United States, et al. v. Jefferson County Board of Education*

This action was filed June 4, 1965, by Negro students and parents against the Jefferson County Board of Education requesting that the board be enjoined from continuing to operate a system of dual and unequal public schools (R. 9-16). The Jefferson County Board of Education maintains approximately 117 schools for 45,000 white students and 18,000 Negro students (R. 80).

The procedures incorporated in the plan for desegregation approved by the court below (R. 30-37, 66-68), adopt with minor modifications the pupil placement procedures utilized by the Jefferson County Board of Education since 1959 to maintain a rigidly segregated public school system. Descriptions of these pupil assignment procedures, of other aspects of the system, and of the plan follow.

A. Pupil Assignment Procedures

From 1959 until adoption of the plan under consideration in 1965 the Board assigned all pupils pursuant to a pupil placement plan (R. 96-107). During this period the district remained completely segregated. On June 22, 1965, Superintendent Kermit A. Johnson testified that "at the present time" Negro and white children are separated within the school district.[5] Total separation of the races

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[5] Q. Heretofore, and at the present time, it is the policy of the Board of Education to separate Negro and white children in the school; isn't that true? A. We have had them separated, and there has not been any

within the Jefferson County School District was effected by utilizing the following pupil assignment procedures:

a. *Assignments:* Students entering the first grade, students newly moving into the jurisdiction of the board, and students residing within the district who have been attending school in another "school community" [6] were "accepted, approved and enrolled" by a principal to his school upon determining that the student resides in his "school community" and that the student "would normally attend his school." [7] (R. 101-102). Without exception, students assigned to schools they "would normally attend" resulted in Negroes being assigned to Negro schools and whites being assigned to white schools (R. 164).

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other operation up until this point. I would hesitate to say the policy of the Board, because we have not had an application up until this time.

Q. But the Board has never authorized you— A. Never taken the initiative for it or authorized me to make any changes. (R. 94)

[6] Dr. Johnson described how a principal would define the boundaries of his "school community" as follows:

> A. They are not defined except those who live relatively close to the school and then there is a broad area there where they might go to his school or some other school and this is a case where he would raise the question whether he should or shouldn't take such students.
>
> Q. You state the only way the principal of any school would know what pupils reside in his school community is on the basis of addresses of the students already in school and who had attended the school in the past? A. That is one of the best guides. He doesn't have a definition of a school community. It is a general thing. We don't have the geographical zones. In general it is always the closest to his school would go to his school. (R. 163)

[7] "How would a principal of a white school, elementary school, know who would normally attend his school? What students would normally attend his school? A. Well, there would be the brothers and sisters of the students he had who lived in that general area.

Q. Assuming a Negro child or a white child lived next door to one another, would that child be a person the principal would consider normally would attend his school? A. In the past they would not come under the general definition of "normally attending that school." (R. 163-164)

b. *Transfers:* Students who desired to attend a school other than the one they "would normally attend" (a school provided exclusively for students of the white or Negro race) or the school within his "school community" (the school nearest his home) were required to apply for a transfer (R. 101-104). Requests for transfers were granted only by the Central Office (R. 101-104). Seventeen "factors" were considered by the Central Office in evaluating transfers.[8] The list includes such matters as "home environment," "severance of established social and psycho-

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[8] The 17 factors (R. 103-104):

"Assignment, transfer and continuance of pupils; factors to be considered—

1. Available room and teaching capacity in the various schools.
2. The availability of transportation facilities.
3. The effect of the admission of new pupils upon established or proposed academic programs.
4. The suitability of established curricula for particular pupils.
5. The adequacy of the pupil's academic preparation for admission to a particular school and curriculum.
6. The scholastic aptitude and relative intelligence or mental energy or ability of the pupil.
7. The psychological qualification of the pupil for the type of teaching and associations involved.
8. The effect of admission of the pupil upon the academic progress of other students in a particular school or facility thereof.
9. The effect of admission upon prevailing academic standards at a particular school.
10. The psychological effect upon the pupil of attendance at a particular school.
11. The possibility or threat of friction or disorder among pupils or others.
12. The possibility of breaches of the peace or ill will or economic retaliation within the community.
13. The home environment of the pupil.
14. The maintenance or severance of established social and psychological relationships with other pupils and with teachers.
15. The choice and interests of the pupil.
16. The morals, conduct, health and personal standards of the pupil.
17. The request or consent of parents or guardians and the reasons assigned therefor."

logical relationships" and the "morals, conduct, health and personal standards" of the pupil requesting transfer (R. 103-104, 158). Applications for "transfers" [9] required the signature of both parents, the occupation and name of the employer of both the students' mother and father or guardian, the race of the applicant. This information was to be included upon a transfer application and submitted to the Superintendent's Office. In considering transfer applications:

> "[T]he superintendent may in his discretion require interviews with the child, the parents or guardian, or other persons and may conduct or cause to be conducted such examinations, tests and other investigations as he deems appropriate. In the absence of excuse satisfactory to the superintendent or the board, failure to appeal for any requested examination, test or interview by the child or the parents or guardian will be deemed a withdrawal of the application." (R. 100).

Superintendent Johnson testified that he never notified parents, students or anyone else in the County that Negro pupils could request assignment to a white school (R. 143). No Negro ever applied for a transfer to an all-white school (R. 94). During 1964-65, 200 requests for transfer were made and 95% were granted (R. 157), but none of these were requests for desegregation (R. 94). No transfer period was designated; requests could be made at any time (R. 93).

c. *Reassignments:* Once enrolled, either by assignment or transfer "[A]ll school assignments shall continue without change until or unless transfers are directed or ap-

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[9] Plaintiffs' Exhibit 2-A (R. 97-98).

proved by the superintendent or his duly authorized representative." (R. 99). Negro elementary school graduates were automatically assigned to a Negro junior high school and Negro junior high school graduates were automatically assigned to a Negro senior high school. Similarly, white students were automatically assigned on a racial basis.[10] The district specifically recognized these automatic assignments or "feeder" arrangements: "An application for Assignment or Transfer of Pupils Card must be filled out for each pupil entering your school for the first time either by original entry or transfer *except pupils coming from feeder schools.*" (R. 101) (emphasis supplied). Thus students were initially assigned to segregated schools and thereafter locked into these assignments. This lock-in effect continued on throughout the students' public school career.

Assignments—whether through transfer, reassignment or initial assignment—were all made to schools which were admittedly constructed exclusively for students of the white or Negro race (R. 130-131). Even as to proposed future school construction, the Superintendent was able to identify the race of the students for whom schools were planned but not yet constructed (R. 131-132). Racial dot maps, indicating the race and residence of every student within the district, are maintained by the Board (R. 89).

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[10] Q. What about students who are, for example, in the sixth grade going to the seventh grade in another school that is separate and distinct? A. Their names are passed over to the high school principal from the elementary principal and their permanent records kept in the individual folders. Every child has a folder with his records in it. They are passed on to the high school and by that procedure the principal knows the number and who it is he is expecting.

Q. That is an automatic process? A. That has been the way it has operated in the past. (R. 195)

B. The Plan Approved by the Court Below

On July 22, 1965 the court below entered an order approving the first plan submitted by appellees (R. 52-53). The United States appealed that order and on August 17, 1965 this Court vacated the judgment and remanded the cause for further consideration. *United States* v. *Jefferson County Board of Education,* 349 F.2d 1021 (5th Cir. 1965). Thereafter appellees filed an amended plan (R. 66-68) which was approved by the court below on August 27, 1965. This amended plan is the subject of this appeal.

The amended plan adopts the pupil assignment procedures discussed above—procedures which effectively perpetuated a totally segregated dual system of schools—subject to the following modifications:

1. Every student is initially assigned to a segregated school. Students entering grades 1, 7, 9, 11 and 12 during school year 1965-66, grades 2, 3, 8 and 10 during 1966-67 and grades 4, 5 and 6 during 1967-68 may therafter apply for a transfer from the segregated schools they are initially assigned to. Transfer applications are to be considered in light of the "factors" set out in footnote 8, *supra.*[11] Transfer applications must be picked up and completed application forms must be deposited at the office of the superintendent (R. 67).

2. Students entering grade 1 shall register at schools provided for students of their race—Negro students at Negro schools and white students at white schools. Any entering first grade student may apply for a transfer to another school by following the steps set out in para-

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[11] White students are thereby insured of space in the formerly white schools. Applications for transfer by Negro students are to be considered in light of the space available at the school applied for. A ground for rejecting an application is overcrowding. See footnote 8, *supra.*

graph 1 above only after registering at a segregated school (R. 164).

3. Negro students new to the district may attend a school formerly provided for whites only if the student is entering a grade being desegregated under the plan (R. 213).

4. Notice of the plan shall be published three times in a newspaper of general circulation within the county (R. 34).

Superintendent Johnson was asked:

> Q. How then does this plan change the method of assignment which by your testimony has not resulted in any Negro attending any white school and white attending any Negro school? A. The biggest change I can think of is this will be the first time we have advertised the fact in the daily newspapers that they may do this and the requests will be considered seriously and probably approved. We have never done that before and this would be a change (R. 162).

Appellees' plan permits Negroes to transfer out of the segregated schools to which they are initially assigned, providing they submit a request for transfer on a form which they must pick up at, and after completion deliver to, the superintendent's office; and, they are not disqualified by one or more of the 17 tests set out in footnote 8, *supra.*

Superintendent Johnson's justification for initially assigning all entering Negro first graders to Negro schools is "we feel this would be the logical place for him to go. His brothers and sisters have gone there in the past and he would be in an atmosphere of people he had known

in the past and we think it is the easiest way for him to make his wishes known" (R. 164).

C. Faculty Assignments

The plan contains no provisions for ending faculty assignments based on race.

The board employed a total of 2,268 school teachers, including approximately 600 Negroes (R. 118). All Negro teachers possess qualifications required by the school board (R. 121); 35 white teachers failed to fulfill the school board's minimum requirements (R. 136-137). Negro teachers teach only Negro students (R. 121). White teachers teach only white students (R. 122). Negro supervisory personnel are confined to supervising Negro students and schools (R. 122) and are provided offices apart from white supervisory staff (R. 123, 144). Teacher turnover within the system averages approximately 13% per year (R. 120). Dr. Johnson testified that the 2,200 teachers in the system were qualified to each any child in the system within their subject specialty but that "the main problem" to teacher desegregation would be "acceptance on the part of the parents" (R. 135), and Negro teachers would encounter difficulties in teaching white students "because of the traditions and practices of our people up until this time" (R. 144).

D. Bus Transportation

The plan contains no provision for desegregating transportation facilities.

The 253 buses maintained by the district were operated on a segregated basis (R. 123-124) pursuant to separate route maps—one setting out routes for Negro students and a second for white students. These routes overlapped each other in some instances (R. 127-128).

E. Inequality in Facilities for Negroes

The plan contains no provision for eliminating various tangible inequalities in the facilities for Negroes and whites.

The superintendent testified that although there is only one vocational school for white boys, Negro high schools have comparable vocational subjects not offered in white schools (R. 146). The only high school not accredited by the Southern Association is Negro Praco High which the superintendent said had not applied for an accreditation (R. 220). The Negro Rosedale school has grades 1-12; white Shades Valley school has grades 10-12 (R. 221). The two schools are about half a mile from each other. Rosedale has five or six acres; Shades Valley has about twenty acres. Shades Valley has an auditorium, a stadium and a separate gymnasium; Rosedale lacks a stadium and a gymnasium (R. 221-222, 232).[12] Although the superintendent could name five white schools having summer school sessions, he could not "recall" other schools having such sessions (R. 232). Negro Gary-Ensley Elementary School has outdoor toilet facilities (R. 234). In Negro Docena Junior High School, there are pot-bellied stoves rather than central heating. Students must go a block away to use indoor toilet facilities (R. 233-34). The superintendent could not recall a Negro school which had a stadium with seats and lights. He stated that Negroes have not wanted to play football at night (R. 235). Most stadiums and lights, including an $80,000 stadium at white Berry High School, have been provided, according to the superintendent, by citizen efforts (R. 235-36). He did state, however, that the school system gives assistance to

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[12] By way of contrast to the Rosedale-Shades Valley situation, the superintendent testified that Negro Wenonah *High* School had facilities superior to white Lipscomb *Junior High* School (R. 240-41).

such efforts by grading the ground and furnishing the light fixtures (R. 236).

An appendix to Intervening Plaintiff's Exhibit No. 1, shows that of the 79 white and 32 Negro schools listed, 81.3% of the Negro schools and only 54.4% of the white schools had a student enrollment above capacity. Thus 33.3% of the Negro students (or 4,587 Negroes) were enrolled in schools having over capacity population, while only 10.1% of the white students (or 4,125 whites) were enrolled in such schools. The United States also proved that 45.6% of white schools but only 18.7% of the Negro school enrollments were under capacity (R. 203).

F. Others Matters

The plan contains no provisions for individual notice to pupils, no provision with respect to locating new school buildings or additional facilities in such a manner as to eliminate segregation, no provisions with respect to non-discrimination in various school connected or sponsored activities or in extracurricular activities, and no provisions with respect to periodic reports to the court concerning desegregation.

G. Administration of the Plan

In the first year of the plan, 1965-66, only 24 of approximately 18,000 Negroes attended formerly white schools. (Affidavit of St. John Barrett attached to Motion to Consolidate and Expedite Appeals in these cases, filed in this Court April 4, 1966.) In the second year of the plan, the current 1966-67 term, about 75 Negro pupils attend formerly white schools. (Information supplied to intervenors and appellants by U. S. Department of Health, Education, and Welfare.)

III. *No. 23,331, United States, et al. v. Fairfield Board of Education*

The board maintains nine public schools in the City of Fairfield, Alabama which serviced a total school-age population of 3,095 children during the 1964-65 school term. Of this number 2,273 were Negro and 1,822 were white (Intervenor's Exhibit No. 3).

By long term policy and practice, the board segregates Negro school children from white school children through the use of dual racial school zones (R. 182, 183, Intervenor's Exhibit 3). In 1954 Negro parents petitioned the board to desegregate the schools and again in May, 1965, Negro parents petitioned for desegregation. The board did not respond to either petition (R. 125-27, 220-23). On July 21, 1965, Negro parents and school children brought suit against the board asking for a preliminary and permanent injunction against continuing segregation of students and teaching staffs (R. 14-23). The district court found there was an illegally segregated system in Fairfield (R. 84), and pursuant to a court order the board filed a Plan and later an Amended Plan for Desegregation of Fairfield Schools System (R. 59).[13]

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[13] On August 17, 1965, the board filed a Plan for Desegregation of Fairfield School System (R. 48), which the court failed to approve. This first plan provided in part that

(1) Negro children in the 9th, 11th, and 12th grades would be permitted to apply for transfers which transfers would "be processed and determined by the board pursuant to its regulations . . ." (R. 49).

(2) Negro children entering the 1st grade would be assigned to Negro schools, but if both parents accompany the child and sign an application on the first day of school, the child would be permitted to apply to a white school (R. 50, 151-155).

(3) Applications to be acted upon for the 1965-66 term had to be filed at the office of the board between 8:00 A.M. and 4:30 P.M. on August 30, 1965 (R. 50, 151).

(4) During the 1966-67 terms, the 2nd, 3rd, 8th and 10th grades would be desegregated. During the 1967-68 terms the remaining 4th, 5th, 6th

The amended plan, which the district court approved, provides that:

(1) Negro students in the 7th, 8th, 10th and 12th would be allowed to apply for transfer to white schools if their applications were submitted to the board on or before August 30, 1965, the applications to be processed by the board "pursuant to its regulations" (R. 60).

(2) Negro children entering the 1st grade must attend a Negro school unless the parents of the child on the first day of school apply for his assignment at a white school (R. 61).

(3) Applications of Negro children for admission to white schools or white children to Negro schools are to be reviewed by the superintendent "pursuant to the regulations of the board" (R. 61). (A similar process is not required for applications of Negroes for transfer to Negro schools or white children to white schools.)

(4) During the entire month of May 1966 applications by Negro children for transfer to white schools in the 2nd, 3rd, 9th, and 11th grades for the 1966-67 school term will be accepted. (No provision is made for publication of notice prior to May of 1966) (R. 61-62 and 157-158).

(5) During May of 1967 applications by Negro students for transfer to the remaining segregated 4th, 5th, and 6th grades will be accepted by the board for the 1967-68

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and 7th grades would be desegregated. Applications by students entering desegregated grades would be accepted from the period of May 1 through May 15 preceding the September school term opening for the desegregated grades (R. 50-51).

(5) Unless Negro students applied for and obtained transfer, they would be assigned to Negro schools (R. 51).

(6) The Board would publish in a newspaper of general circulation the provisions of the plan on three occasions prior to August 30, 1965 (R. 51).

school term. (No provision is made for publication of notice prior to May of 1967) (R. 62 and 157-158).

(6) Except for those students applying for and receiving transfer, the schools within the Fairfield system will remain segregated.

(7) One notice of the plan is to be published for three days prior to August 30, 1965 (R. 63).

The plan is silent as to admission of named plaintiffs, desegregation of faculty and extracurricula activities, abolition of dual zone lines, and filing of progress reports with the Court. The plan also does not mention the construction and location of new schools and their effect on desegregation.

Under the plan, transfer applications are not granted as a matter of course, but the board, in its discretion, may deny transfer (R. 149, 166).

As understood by school officials, the plan requires both parents request transfer to a white school before an application will be considered (R. 150-152). This is also true for students applying to the first grade, although they are required to present themselves at schools with an application signed by both parents and application forms are not available prior to the time of initial enrollment (R. 153). Transfer forms are distributed to principals of schools in Fairfield but are not distributed to parents or students unless a request is made of the principal (R. 154). A Negro unable to obtain certain courses because they are taught only in the white schools will not be considered for transfer unless the plan covers the grade in which he is enrolled (R. 159). The plan is also silent as to the standards to be applied to transfer requests from students moving into the district subsequent to the transfer period (R. 158).

Prior to desegregation the board permitted applications for transfer during a three-month period but the desegregation plan reduces this period (R. 145). When asked by the district judge to explain why "such a restrictive period" had been decided upon the superintendent stated:

> My reaction to that point would be we are moving, it seems, from a segregated school to an integrated school system, and the rules of the game are just going to be different in the future from what they have been in the past (R. 145).

The record shows that the tangible facilities and services available at the Negro and white schools are not equal. The white schools in the City of Fairfield are organized on a 6-3-3 plan, i.e. the first six grades in an elementary school; the seventh, eighth, and ninth grades in a junior high school; and the tenth, eleventh, and twelfth grades in a senior high school (R. 87, 96, 189-190). Although the 6-3-3 system is thought to be the most educationally sound school-organization plan by the school authorities, Negro schools are not organized on a 6-3-3 plan (R. 87, 96, 189-190, 192).

The teacher-pupil ratios for the 1964-65 school term at the various schools are these:

Negro	*White*
Grades 1–6	
Robinson 34/Teacher	Forest Hills 26/Teacher
Englewood 25/Teacher	Donald 26/Teacher
Grades 7–9	
Interurban 35/Teacher	Fairfield Junior High 28/Teacher
Grades 10–12	
Industrial High 29/Teacher	Fairfield 20/Teacher

(Computed from Intervenor's Exhibits No. 3)

The plant facilities provided for the Negro children are inferior to those provided for white students. The buildings are in disrepair (R. 217-218, 207-210); the lavatory facilities are unusable, in part, or otherwise of inferior quality or condition (R. 108-109 and Defendant's Exhibits 7 & 8). Vermin and ants have been found in eating facilities (R. 164-167, 218) and there is little recreational area provided around the Negro schools while each white school is provided with ample grounds (R. 91-93, 97, 98, 210, 211, 212, 218). The per pupil values of the plant facilities of the Fairfield school system are these:

Negro		*White*	
Robinson Elementary	$ 258	Donald Elementary	$ 743
Englewood Elementary	492	Forest Hills Elementary	920
		Glen Oaks Elementary	817
Interurban Junior High	130	Fairfield Junior High	699
Industrial High	1,525	Fairfield High	2,476

(Computed from Defendant's Exhibit No. 11)

Numerous courses which are offered to the white students in the junior and senior high schools are not offered to the Negro students in comparable grades in the various Negro schools (R. 90, 131-132, 215, 201). A full-time guidance counselor was provided for the white students at Fairfield High School and not for the Negro students at Industrial High School (Intervenor's Exhibit 3).

On August 23, 1965, the District Court overruled the objections of the Negro plaintiffs and the United States and approved the amended plan of the board (R. 65). On September 8, 1965, the court formalized its findings and ordered the desegregation of that system pursuant to the amended plan (R. 67-72). On August 20, 1965, the court rejected the objections raised by the Negro plaintiffs and the United States (R. 84). An attempt was

made to show that the inferior condition of the Negro schools should have some effect upon the rate of desegregation and the provisions of the plan, but the district court held this evidence to be irrelevant (R. 169-170).

On October 22, 1965, the United States filed a Notice of Appeal from the order of the district court overruling its objections and approving the plan of the Fairfield Board of Education (R. 73).

During the 1965-66 school year only 31 of 2,273 Negroes attended formerly all-white schools.[14] The Department of Health, Education and Welfare informs intervenors and appellants that a total of 49 Negroes attend white schools during the present school year. None of the system's 1,779 whites attended formerly Negro schools.[15]

IV. *No. 23,274, United States, et al. v. Caddo Parish School Board*

There are approximately 72 schools under the jurisdiction of the board (R. 191) which includes the city of Shreveport and rural areas of the parish. Attending these schools are approximately 55,000 children of whom 24,000 are Negroes (R. 191, 189). The board employs approximately 2,200 teachers (R. 191).

Racial separation within the system was maintained through the use of dual attendance zones (R. 69, 81). No Negro child attended any school in which white children were in attendance; no Negro teacher was employed at any school at which white children were in attendance (R. 74-75, 81, 91-92). Athletic facilities and bus transportation were segregated (R. 107-08, 110-12).

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[14] Affidavit of St. John Barrett attached to Motion to Consolidate and Expedite Appeals filed April 4, 1966.

[15] *Ibid.*

After the decision of the Supreme Court in *Brown* v. *Board of Education,* the board made no effort to end segregation in the schools, being of the opinion that it had no duty or responsibility to do so until, and only to the extent that, it was so ordered by a court of the United States (R. 87-89).

On March 23, 1965, Negro school children and their parents notified the board that they and other Negro children desired to attend the public schools of the Parish without discrimination on the basis of their race (R. 60). The board replied that it had "gone the extra mile" in its efforts to provide the best education for all students, but took no affirmative action to desegregate or honor the request of these Negro children and their parents (R. 62, 73).

On June 14, 1965, the district court found that the school board had operated a compulsory segregated system, enjoined the board from continuing and maintaining a racially segregated school system, and ordered the board to submit a plan to desegregate the schools of the parish (R. 133-36). The court stated that it issued the decree "not willfully or willingly, but because we are compelled by decisions of the Supreme Court . . . [and] . . . the Fifth Circuit . . ." (R. 131). The board submitted a desegregation plan on July 7, 1965 (R. 138-50). Objections were filed July 21, 1965 (R. 158-60) and hearing was held on the objections August 3, 1965 (R. 161 et seq.).

The board first proposed a plan in which students, after being initially assigned on the basis of race, would be permitted to request transfer to the school closest to their residence (R. 141). It was established at the hearing that in many instances this would result in Negro children applying for transfer from one Negro school (the original

assignment) to another Negro school (the school closest to residence) (R. 273-274).

As a result of the hearing, the plan was approved, as modified, and incorporated into an order by the District Court August 3, 1965 (R. 291-98). On August 20, 1965 the district court altered the plan in light of the decision of this Court in *United States* v. *Bossier Parish School Board,* 349 F.2d 1020 (August 17, 1965) (R. 300-04).

The plan as finally approved provides for transfer applications for grades one, two, eleven and twelve during the 1965-66 school year, remaining grades to be covered during the 1966-67 and 1967-68 terms (R. 303-04). All initial school assignments of children entering the first grade and those presently enrolled from prior years, would "be considered adequate" subject only to these transfer provisions (R. 291-95).

The community is to be advised of the plan by publication in a local newspaper advising of the right to request transfers. There are to be no individual notices.

Negro children in the covered grades could apply for transfer to white schools only if they applied within a five-day period extending from August 9, 1965 through August 13, 1965, although prior to issuance of the plan transfer applications were permitted throughout the school year (R. 85, 95, 96). Application forms would not be distributed to all students but would be available from principals on request.

Transfer applications would be granted if in "the best interest of the child" and if applicants met transfer criteria (R. 182, 292-94) such as available space,[16] age of the pupil as compared with ages of pupils already attending

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[16] All schools in the Parish are overcrowded (R. 258-59, 281).

the school to which transfer is requested, availability of desired courses of instruction, and an aptitude test (R. 147, 217, 243-48). These criteria are part of "the procedures pertaining to transfers currently in general use by the Caddo Parish School Board" and are incorporated in the plan (R. 292). An interview may be required and if parents fail to attend the transfer application is considered withdrawn (R. 145, 146).

The board specifically refused to obligate itself to provide busing for transfer students to formerly all-white schools although in some cases this would require students to arrange trips of about 19 miles (R. 70, 143, 206).[17]

The board was granted the right to reassign a transfer applicant to a "comparable" school nearer his residence. However, "comparable" is not defined in the plan.

Students moving into the parish are initially assigned according to race to formerly all-white or all-Negro schools (R. 177-78, 295).

The order did not provide for assignment of named plaintiffs to white schools or for desegregation of faculty, extracurricular activities or transportation facilities. Progress reports to the court are not required. A spring preregistration of future first graders "is very important" (R. 95, 94) to administration of the system but the plan is silent regarding its desegregation. The plan does not mention the construction and location of new schools and their effect on desegregation.

During the first year of the plan's operation, only one Negro child of the 24,457 attending public schools in Caddo

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[17] There was testimony that all or nearly all the white children from the rural area of Caddo Parish were bussed into Shreveport from as much as 19 miles away. Rural Negro children were provided with three Negro high schools located at various points about the county closer to their residence than the Shreveport schools (R. 274-75).

Parish (of whom approximately 1,720 are entering first-graders) has been admitted to a formerly white school (R. 78). (See the affidavit of Mr. St. John Barrett attached to motion to consolidate and expedite filed in this Court April 4, 1966).

July 19, 1965, the United States sought leave to intervene as of right as party plaintiff and to file objections to the desegregation plan submitted by the board. At the August 3, 1965 hearing on the plan, the district court denied the motion to intervene (R. 166) on October 4, 1965, the United States filed notice of appeal to this Court from the order denying intervention (R. 305). The panel found that "the motion was timely filed and should have been granted" (Slip Opinion p. 116).

V. *No. 23,365, United States of America, et al. v. The Bossier Parish School Board*

This is the fourth appeal to this Court involving segregation in the Bossier Parish schools. See *United States* v. *Bossier Parish School Board,* 220 F. Supp. 243 (W.D. La. 1963), aff'd per curiam 336 F.2d 197 (5th Cir. 1964), cert. den. 379 U.S. 1000, an unsuccessful attempt by the United States to sue for desegregation prior to the 1964 Civil Rights Act. See also two prior appeals in the present suit, *sub nom. United States* v. *Bossier Parish School Board,* 349 F.2d 1020 (5th Cir. 1965) (per curiam) and *Bossier Parish School Board* v. *Lemon,* No. 22,675, 5th Cir., January 5, 1967 (not yet reported).

This suit was commenced in December 1964 by a group of Negro servicemen and their families who were assigned to the Barksdale Air Force Base near Bossier City, Louisiana; the United States intervened and brought this appeal.

The present appeal involves the "adequacy," under *Brown* v. *Board of Education,* 349 U.S. 297, 301, of a court-ordered plan of desegregation (R. Vol. II, 251-258; as amended R. Vol. II, 261-263). (NB The record on this appeal is in two volumes. Volume I consists of the record multilithed for use in 5th Cir. Case No. 22,675, a prior appeal. Volume II is marked as Case No. 23,365 and consists of 281 pages.)

Bossier Parish, which adjoins Caddo Parish in northwest Louisiana, is a rapidly growing area (R. II-40) which embraces both urban (Bossier City) and rural areas and several large federal installations, including the Barksdale Air Force Base. Its Superintendent of Schools described the system as the most federally impacted system of its size in the South (R. II-38). The Superintendent also described the areas as a "hard core segregation area" where people have "strong and fixed opinions in opposition to integration," and said in March 1965 that "Bossier Parish is not ready for integration" (R. I-56).[18]

The school system had (in the spring of 1965) 15,267 students, including 10,894 white pupils and 4,375 Negroes,

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[18] The quoted remarks are from a written answer to an interrogatory inquiring what obstacles there were to complete desegregation in the 1965-66 term (R. Vol. I, 40). The Superintendent responded (R. Vol. I, 56) with the following:

> Bossier Parish, Louisiana can properly be termed a "hard core" segregation area. The people in Bossier Parish have strong and fixed opinions in opposition to integration. People here feel that negroes in Bossier Parish are treated fairly and with justice and there has been an unusual degree of racial harmony. Indeed, from the negroes in Bossier Parish there has been no desire expressed for integration of the races other than that which come from Barksdale Air Force Base; that is, from non-Bossier Parish negroes.
>
> In contrast to some other areas of the South which have maintained segregated school systems, Bossier Parish is not ready for integration.
>
> /s/ EMMETT COPE
>
> EMMETT COPE, Individually and on behalf of the Bossier Parish School Board

in 23 school buildings (R. Vol. I, 45-46). There were 17 all-white and 6 all-Negro schools (*Ibid.*). About 1,100 students live on the Barksdale Air Force Base, and approximately 4,400 students are "federally connected" (R. Vol. II. 36). The student population has a large turnover which includes an average of 1,000 to 1,500 newcomers each year, largely due to the federal installations and related industries (R. Vol. II. 38). The system received more than $1,860,000 for school construction from the Federal Government between 1951 and 1964 (R. Vol. I. 104), and also received substantial annual amounts of federal funds for maintenance and operation of the schools, including more than half a million dollars in November 1964 (R. Vol. I. 108).

There was no desegregation of the Bossier schools until September 1965 when twenty-five (25) Negroes were admitted to six previously all-white schools (R. Vol. II. 266). Until 1965, the schools were completely segregated with a system of dual school zones for Negroes and whites (R. Vol. II. 43-45). The 700 teachers in the system were also assigned on the basis of race (R. Vol. II. 175, 179). In school taxation district 13, the urban area, all Negro children, regardless of residence, were assigned to either Butler School (grades 1-6) or Mitchell School (grades 7-12) (R. Vol. I. 45-46; Vol. II. 160). White pupils in district 13 were assigned to elementary, junior high or high schools on the basis of geographic attendance areas reflected on maps which were revised annually to adjust to changing conditions (R. Vol. II, 44, 67-69, 159-161, 168). Similarly, there were dual zones in the rural areas, all pupils having been assigned on a dual zone racial basis (R. Vol. II. 127, 130). Under the segregated system pupils were placed in schools by assignment and not by choice (R. Vol. II. 130). The board also maintained separate

school buses, and bus route maps for Negroes and whites (R. Vol. II. 244-245).

After the trial judge in April 1965 ordered the board to submit a desegregation plan, the board appealed that order[19] but, as there was no stay in effect, submitted three alternative proposals for desegregation (R. Vol. II. 1-12). None of the proposals involved a start of desegregation until 1966, and the proposed completion dates ranged from 1970-71 (the board's first choice) to 1968-69. We omit any detailed description of the board's proposed plan, except to state that under the proposal all prior initial assignments—all of which were segregated—were "considered adequate", subject to a pupil's right to transfer to "the nearest formerly all-white or all-colored school" (R. II. 4). Although the plan was labeled as one considering both "freedom of choice" and "proximity" by the superintendent (R. Vol. II. 92), all Negro first graders were directed to register at the all-Negro Butler School and white children were directed to the white schools. The superintendent sought to justify this by his assumptions that the majority of Negroes would want to go to Butler, and that they would get better registration advice from teachers of their own race (R. Vol. II. 124-125). The private plaintiffs and the United States filed objections to the plan (R. Vol. II. 13-15, 30-33), and a hearing was held on July 28, 1965.

On July 28, 1965, the District Court entered an order requiring desegregation in September 1965, in grades 1 and 12 (R. Vol. II, 251-258). The United States promptly appealed (R. Vol. II, 258), and this Court within a few weeks vacated the judgment and remanded for reconsideration (R. Vol.

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[19] This court rejected the board's arguments on appeal calling them a "bizarre excuse" for segregation. *Bossier Parish School Board v. Lemon*, No. 22,675, 5th Cir., January 5, 1967. Undaunted, the board promptly filed a rehearing petition, still resisting the order to desegregate in January 1967. Rehearing was denied February 6, 1967.

II, 260; see 349 F.2d 1020). The plan was then amended by the trial judge to permit desegregation in two additional grades in 1965 (R. Vol. II, 261-263). There were no other changes in the plan, and the United States then brought this appeal, in which the private plaintiffs were permitted to intervene.

The Court Ordered Plan, as Amended
(R. Vol. II, 251-258, 261-263)

1. *Rate of desegregation.*

The plan, as amended, provides for desegregation in three years, as follows:

School Year	*Grades Desegregated*
1965-66	1, 2, 11, 12
1966-67	1, 2, 3, 4, 9, 10, 11, 12
1967-68	All Grades

The plan also provided that all pupils newly entering the school system would be eligible for desegregation in 1965 without regard to their grades (R. Vol. II, 255).

2. *Method of assignment.*

a. *1965-66 school year.* Initial assignments, already made on a completely segregated dual racial zone basis were "considered adequate" subject to certain transfer rights (R. Vol. II, 251). Transfer provisions for the various grades affected were as follows:

Grade 1—Notice to be published in newspaper for three days advising that applications to first grade in any school could be made by applying in person at school board office during four day period (R. Vol. II, 252-25). As implemented, the board ran a notice of this provision for "Any Negro child . . . who desires to attend a formerly all-white

school" to apply in person at the school board office in Benton, Louisiana accompanied by his parents or guardian (R. Vol. II, 271).

Grades 2 and 11—The procedure prescribed in the order was similar to that for grade 1. The board's newspaper notice, said that "Any Negro child . . . who desires to attend a formerly all white school, will report . . . in person, accompanied by his or her parents or guardian to the School Board office at Benton, Louisiana." A three-day period was prescribed (R. Vol. II, 273).

Grade 12—The order provided that all 12th grade students, regardless of race, were to be mailed notices advising of the right to transfer to any school by applying in person, accompanied by parents, during a four day period (R. Vol. II, 252). The notice actually mailed to pupils (R. Vol. II, 269) said that pupils could apply for a transfer, but it contained no statement indicating that pupils would be accepted in any school regardless of race, or that grade 12 was desegregated, or any similar explanation (R. Vol. II, 269-270).

The court order did not grant an unconditional right of free choice. Rather, it provided that requested "transfers or assignments . . . shall not be unreasonably denied" (R. Vol. II, 253). It listed certain criteria to be applied in granting or denying requests, including desire of pupils and parents, availability of space and other facilities in the school to which transfer or assignment is requested, age of the pupil as compared with ages of pupils already attending the school, and availability of requested courses of study (R. Vol. II, 253-254). The order also provided that the board may "if it deems it advisable" assign a pupil to "another school, in all respects comparable to the one to which transfer or assignment is requested, closer to the applicant's residence" (R. Vol. II, 254). All pupils

whose requests were denied were to get a notice setting forth specific reasons (R. Vol. II, 255).

b. *School years subsequent to 1965-66.* Only very general provision was made in the order with respect to the method of assignment in future years. The order provides only that "initial assignments . . . shall be made purely and simply on the basis of individual choice, reserving to all pupils, however, the right to apply for transfer in accordance with the procedures hereinabove established, and reserving to the School Board . . . the right to place a pupil in a comparable school other than the school of his choice . . . closer to the pupil's residence" (R. Vol. II, 256). The order also provides that "Dual school districts on racial lines shall be abolished".

Because these provisions are so general, a variety of things are unclear. The plan does not state (1) whether school attendance lines and the feeder system will be used in some manner in the future; (2) whether once assigned to a school, pupils will be required to make an annual choice of schools or will remain where they previously were assigned unless they seek transfers; (3) what will be done if pupils indicate no preference; (4) whether pupils already attending a school will have priority over others choosing a school in the event of overcrowding; (5) or any definition of the "comparable school" discretion given to the school board.

3. *Notice and related procedures.*

The procedures ordered and utilized for the 1965-66 term were set forth in the discussion above. The order gives no details with respect to the procedures in other years except the general statement that the assignments will be "subject to all reasonable procedural requirements

that may be adopted and promulgated by" the school board (R. Vol. II, 257). This leaves unclear, for example, whether the choice and transfer procedures will be only for Negroes and not for whites as they were in grades 1, 2 and 11 in 1965; whether there will be individual notices or only newspaper advertisements; and whether the school board may adopt its proposal of having all Negroes register at Negro schools and all whites at white schools. Other unresolved issues related to the content of notices, the time for transfer, whether pupils and parents must appear in person at the school board office, etc. The plan deals with none of these matters.

4. *Transporation.*

The plan makes no mention of transportation facilities. In a somewhat confusing colloquy between the superintendent and the Court, during trial, the superintendent may have indicated an intention to desegregate buses (R. Vol. II, 101-102). The extent, if any, by which the prior pattern of segregated buses, and bus routes for Negroes and whites is to be changed is unclear.

5. *Faculty and staff desegregation.*

The plan makes no mention of faculty desegregation. The school authorities made clear that they had no plans to end the system of assigning faculties on a racial basis (R. Vol. II, 179-180). The faculty turnover rate was about 9.2% annually (R. Vol. II, 176).

6. *School connected activities, extra-curricular activities, etc.*

The plan contains no provision with respect to these matters.

7. *New construction.*

The plan makes no reference to planning new facilities or additions so as to eliminate segregation. At least two new buildings had been built and opened on a segregated basis during the three years superintendent Cope had been in office (R. Vol. II, 80).

8. *Unequal Negro school facilities.*

The plan makes no provision for steps to equalize educational opportunities for Negroes in the parish.

The schools operated for white and Negro children in Bossier Parish show considerable disparity in a number of qualitative aspects. The white high school (Bossier) for one district offers 53½ courses over a four year period, including two years of Latin, two years of French, two years of Spanish, and three years of art (R. Vol. II, 184-185). However, the Negro high school (Stikes) for the same district offers only 28 courses, and offers no Latin, French, or Spanish (R. Vol. II, 186). Another district's white high school (Airline) offers 43.5 courses, while the Negro high school (Mitchell) offers 30.5 (R. Vol. II, 189). Similarly, the white high school (Haughton) for a third district offers 40.5 courses, while the Negro high school (Princeton) offers 34 (R. Vol. II, 192). The Superintendent stated that the criterion for offering a course was:

> if a course is requested on the senior high level by as many as ten students we attempt to offer that course in that particular school. Yet, at the same time, there are other factors where maybe ten students have not applied as far as conditions are concerned in the other schools and I think that situation has to be taken into consideration (R. Vol. II, 100).

Disparities are found in other respects in addition to the number of course offerings. While there are two full time guidance counselors at Airline (white), there are none at Mitchell (Negro) (R. Vol. II, 190). In fact, while there generally are guidance counselors at the schools for whites in the parish, there are none at any of the Negro schools (R. Vol. II, 187, 194). At the Princeton school (Negro), there are 3.8 volumes of "approved books in good condition" per pupil, while at Haughton (white) in the same district there are 6.3 per pupil (R. Vol. II, 190-191).

Mr. William Stormer, of the United States Office of Education, Department of Health, Education, and Welfare, an expert in the evaluation of the quality of school plants, testified on his inspection of the Bossier Parish schools in the summer of 1965 (R. Vol. II, 195-198). Using the Lynn-McCormick Rating System which combines a number of weighted ratings to allow numerical comparisons between schools, he determined that the highest white school (Airline) ranked at 82 on the scale, while the highest Negro school (Mitchell) ranked at 16 (R. Vol. II, 199, 202). Fifteen of the seventeen white schools rated above the top Negro building (R. Vol. II, 202). When challenged upon cross-examination that there was really no dramatic difference between the Negro and white schools, he responded: "Yes, there is. I beg your pardon. For example, the wooden structures used at Stikes for what I presume to be elementary classrooms . . . there are no wooden structures at Curtis" (R. Vol. II, 209). Similarly, the structures used for elementary grades at Irion (Negro) are wooden, while those used for the same purpose at Benton (white) are not (R. Vol. II, 209). The home economics facilities at Stikes high school (Negro) are in a wooden frame two story structure, whereas similar facilities at Bossier high school (white) are in a modern main building (R. Vol. II, 200).

All of the Negro schools must use their gymnasiums as auditoriums, while Airline, Bossier, Benton, and Haughton schools which are all white have separate auditorium facilities (R. Vol. II, 200-201). The gymnasium floors in all of the Negro high schools are constructed of cement or asphalt tile surface, compared to wooden floors in all of the white high schools (R. Vol. II, 200).

9. *Periodic compliance reports.*

The plan makes no provision for periodic compliance reports to indicate the extent of desegregation under the plan. However, in September 1965, the board voluntarily filed a report indicating that 25 Negroes had been admitted into six formerly white schools (R. Vol. II, 266-267). No subsequent reports have been made.

VI. *No. 23,116, Davis v. East Baton Rouge Parish School Board*

The East Baton Rouge Parish school system includes the City of Baton Rouge, Louisiana's state capital, as well as rural areas in the parish. The system, in 1965, had 87 schools housing 54,894 pupils (R. 70) and about 2,300 teachers (R. 123). About 60% of the pupils and teachers were white and 40% were Negroes.[20] There were 33 all-Negro schools, 50 all-white schools, and 4 predominantly white schools attended by a few Negroes (R. 49-50, 93). Although this school desegregation litigation was commenced in 1956, the parish schools remained completely segregated until the court ordered a twelve year desegregation plan to begin in the 1963-64 term. The early litigation is described briefly in the note below.[21]

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[20] There were 33,186 white pupils and 21,708 Negro pupils (R. 70-71).

[21] The board was enjoined on May 25, 1960, and ordered to desegregate with deliberate speed. This Court affirmed. *East Baton Rouge Parish*

In 1963, twenty-eight Negroes (of 38 applicants) were admitted to white schools at the 12th grade level (R. 93-94). In 1964, sixty-one Negroes (of 99 applicants) were admitted to white schools in the 11th and 12th grades (R. 99-100). Only four of the fifty-four white schools were desegregated (R. 93). No white pupils sought transfer to all-Negro schools (R. 61). No figures for 1965 appear of record, but apparently, about 130 Negroes were admitted to white schools in grades 1, 2, 10, 11 and 12 in September 1965.[22]

After the 1963 desegregation plan (R. 4-9; 219 F. Supp. at 885-887) had been in effect two years, the plaintiffs moved for amendment and acceleration of the plan, and made various objections to the manner in which it was administered (R. 11-28). Following a hearing (R. 170-251), the Court ordered the board to present an amended plan in accordance with its directions (R. 158-159, 242-250). An amended plan was presented and approved (R. 161-167). Plaintiffs appealed from the order approving the plan (R. 167).

School Board v. *Davis,* 289 F.2d 380 (5th Cir. 1961), cert. den. 368 U.S. 831 (1961). On January 22, 1962, no steps to implement desegregation having been taken by the board, plaintiffs sought further relief in the trial court. In March 1963, Judge West, expressing his disagreement with the *Brown* decision, nevertheless "reluctantly" ordered the school board to file a desegregation plan. *Davis* v. *East Baton Rouge Parish School Board,* 214 F. Supp. 624, 625, 626 (E.D. La. 1963). The board filed a plan to begin in 1964 and desegregate one grade a year for 12 years; the Court ordered desegregation to begin in 1963 under a grade-a-year plan. *Davis* v. *East Baton Rouge Parish School Board,* 219 F. Supp. 876 (E.D. La. 1963).

[22] This estimate is extrapolated from the School Board's original brief on this appeal where it is stated that a total of 219 Negroes were admitted to white schools in the three year period. (Brief of Appellees, pp. 6-7.) The record reflects that in the spring of 1965, before the plan was amended by court order, 89 Negroes (of 103 applicants) were accepted in white schools in grades 10, 11 and 12 (R. 107).

A. The 1965 Plan

1. *Rate of desegregation.*

The 1965 plan provided that desegregation be extended to all grades by September 1968 according to the following schedule (R. 162):

School Year	*Grades Desegregated*
1963-64 (under 1963 plan)	12
1964-65 (under 1963 plan)	11, 12
1965-66	1, 2, 10, 11, 12
1966-67	1, 2, 3, 4, 10, 11, 12
1967-68	1, 2, 3, 4, 5, 6, 7, 10, 11, 12
1968-69	all grades

Thus, under the plan one grade was desegregated in each of the first two years, 3 additional grades the third year, two grades the fourth year, three grades the fifth year, and two grades the sixth year of operation.

2. *Method of assignment.*

The plan provides that as additional grades were covered by the plan "new districts will be prepared providing the students living within the boundaries of such districts a choice of school to attend on a first come-first served basis without regard to race or color (R. 163). The plan also provides that students will be accepted "at any of the schools within their respective district" until such school is "filled," and that excess registrants shall be sent to the other school or schools in their district for registration (R. 164). It provides that no student shall be denied admission because of race (R. 184).

These provisions must be understood in the context of the board's practices and procedures. The board has maintained 100 school districts or geographic attendance areas

(R. 103). About 70% of the districts contained residences of both races (R. 103), and segregation was maintained by a dual system of attendance districts, with separate overlapping districts and maps for Negroes and whites (R. 74-76, 79-80). Elementary schools were designated as "feeder schools" for designated secondary schools, also on a segregated basis (R. 77, 84-85, 105). This method continues in effect in all grades not yet "desegregated" under the plan's schedule. In those grades which are nominally desegregated, the Negro and white zones are combined into multiple-school districts, so that each zone contains one or more white and one or more Negro schools. Pupils are allowed to choose either the white school or the Negro school in their geographic attendance district (R. 76-78, 83-84). If a pupil fails to make a choice, he remains in the segregated school where he was previously assigned under the pre-existing arrangement (R. 209). The plan makes no mention of abolishing the segregated "feeder system" which moves students on a racial basis if they express no choices.

3. *Notice and related procedure.*

The plan provides that principals and teachers be notified of the attendance districts and that the districts be advertised in the local news media. A registration day is also to be advertised for at least 30 days (R. 163). The superintendent is authorized to use a better method if he can devise one (R. 163-164). There is no provision for individual written notice to pupils or parents. The plan does not specify the content of the public announcements beyond stating that the boundaries and registration date will be advertised.

Similar procedures had been used under the 1963 plan (R. 92-93, 98, 107), in disregard of the court's prior order

that all pupils be given individual mailed notices of their transfer rights (R. 5).

4. *Transportation of pupils.*

The school system operates 250 buses which transport more than 25% of the pupils to school (R. 128-129). The plan provides that transportation will be furnished or not furnished in accordance with state laws and policies without regard to race (R. 164). The plan makes no reference to desegregation of buses or bus routes.

Students are segregated by race on the buses (R. 129). This policy was applied to the Negro pupils admitted to formerly white schools (R. 129, 211). The superintendent was questioned about this (R. 211):

> Q. Would you agree that the way it has been operating in the past is that Negro children when assigned to desegregated schools are still being taken to and from the school in segregated buses? A. Yes.
>
> Q. And my question is: Is there any reason why you would change that, beginning with this Fall and, if not, why not? A. I just have not thought about it.

Judge West sustained objections to questions about desegregating the buses ruling: "We are not interested in the School Bus situation right now" (R. 213).

5. *Faculty and staff segregation.*

The plan makes no provision for faculty desegregation. Judge West denied relief on the faculty issue (R. 246). All faculties were completely segregated on the basis of race (R. 124-125). Negro supervisory personnel assigned to the central administration were segregated in a separate building (R. 125-126, 226-227). Teachers are assigned to

specific schools by the administration (R. 202). About 13 or 14 percent of the teachers are replaced each year in the regular turnover of personnel (R. 147-148).

6. *School connected activities, extra-curricular activities, etc.*

The plan makes no provision with respect to equal access to school connected activities, etc. without regard to race.

7. *New construction.*

The plan makes no reference to planning new facilities or additions to facilities so as to eliminate segregation.

At the time the trial was held, the school board was planning 17 new school buildings in the next five years (R. 130). The school system also made extensive use of temporary classroom building or "T-Buildings" (R. 53, 69). Plaintiffs proffered, but the court refused to consider, testimony of an expert witness, a school administration expert, that certain temporary buildings were arranged so as to preserve segregation. For example, temporary rooms were added to Negro schools while nearby white schools had vacant spaces (R. 267-271).

B. Aspects of the 1963 Plan

The 1963 plan expressly permitted the board to continue to make initial assignments on a racial basis (R. 5). As noted above, the board modified its dual zone procedure so that some Negro pupils were permitted to transfer out of segregated schools to the white schools in their areas. This transfer right was subject to a screening process in which Negro pupils were measured by a variety of criteria which had not been applied to white students attending the schools (R. 6-7). Ten Negro applicants were

rejected in 1963 and 38 were rejected in 1964 by application of these criteria. As an example, one Negro was refused admission to a white school on the ground that he was "nervous" (R. 110). In 1965, the court ruled that the screening criteria could no longer be used (R. 249).

C. Exclusion of Evidence on Adequacy of the Plan

The trial court refused to permit an expert witness, called by the plaintiffs, to be sworn or to testify on the sole ground that the witness was from Massachusetts. The court said: "I don't want someone from Massachusetts coming down to tell the Baton Rouge school board how to run their schools" (R. 228). The witness, Dr. Donald P. Mitchell, was experienced in educational administration and in making school surveys (R. 252-258). He is Executive Director of the New England School Development Council and a member of the Harvard University faculty (R. 261-262). The Court stated that Dr. Mitchell's testimony could be proffered by deposition and filed, but that the Court would not consider it (R. 228, 231).

Dr. Mitchell's deposition was taken and appears in the record at R. 251-287. He testified that the system "is still a segregated system that has slight deviations from that overall pattern" (R. 262); that the "procedures for initial pupil assignment, regardless of grade level, are definitely ones which separate the races" (R. 262); that the transportation was segregated (R. 263); that teachers and supervisors were segregated (R. 263). He said of the plan that "on the results of the last two years and this year approaching, unless the approach is changed, only a token result will come forth" (R. 266). He described the overlapping segregated bus routes as "a prohibitive operation" causing the taxpayers "quite a load" (R. 272-273). He regarded the freedom of choice plan as "a bankruptcy deci-

sion on the part of a local district" and said that the board's earlier policy of having geographic zones "made sense from an administrative point of view" (R. 273-274). He concluded that "The idea that the freedom of choice is democratic is completely hypocrisy because it only applies to the Negro students" (R. 275).

ARGUMENT

Introduction

Appellants urge that the Court *en banc* adopt the opinion and decree filed in these cases December 29, 1966, by the majority of the panel which originally considered them. We urge that the opinion and decree be adopted without modification or amendment.

Because we believe that the opinion and decree of December 29, 1966, stands on its own merits, and answers all of the principal arguments now made by the school boards, this brief does not address the school boards' detailed and carping attacks on the opinion. We have, however, reviewed the facts and described the desegregation proposals of these school boards at length. Study of the actual facts and desegregation plans involved shows that the decisions below were properly reversed by the panel. It shows that none of the varied desegregation plans involved is adequate by any relevant standard. It shows the necessity for a specific and detailed decree to guide the trial courts and school boards.

We argue but a few points. In part I below we discuss some of the most prominent common inadequacies of the school board plans. In part II, we discuss the significant recent opinion by the Court of Appeals for the Tenth Circuit in *The Board of Education of the Oklahoma City*

Public Schools v. *Dowell,* No. 8523, 10th Cir., January 23, 1967, which we believe supports the opinion of December 29, 1966. In part III we discuss some of the circumstances and arguments which support the conclusion in Judge Wisdom's opinion that the various "freedom of choice" methods for desegregating schools "have serious shortcomings" and should be "closely scrutinize[d] by the Courts in the actual circumstances of their operation in particular cases" (Slip opinion, part VI). And, in part IV, *infra,* we state further grounds for our views that the Court should prescribe uniform and detailed standards applicable throughout the circuit; that the decree appended to Judge Wisdom's opinion provides appropriate uniform standards; and that the U. S. Office of Education Guidelines were appropriately given weight in formulating that decree.

I.

The Plans Approved by the Courts Below Are Not Adequate to Effectuate Transitions to Racially Nondiscriminatory School Systems.

Brown v. *Board of Education,* 349 U.S. 294, 301, directs the courts to "consider the adequacy of any plans the defendants may propose . . . to effectuate a transition to a racially nondiscriminatory school system." In *Cooper* v. *Aaron,* 358 U.S. 1, 7, the Supreme Court said the "State authorities were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system." By no means can it fairly be said that the six desegregation plans which we have discussed in detail in the Statement, *supra,* either initiate desegregation or eliminate racial discrimination.

These six cases demonstrate the great variety of arrangements which school boards may call "free choice" plans. We focus on some common inadequacies.

Some of these plans quite explicitly and avowedly continue routinely to assign pupils newly entering the systems, and pupils being promoted from one level to another, to schools on a racial basis. They violate the elementary principle announced in dozens of cases, but apparently first articulated in *Jones* v. *School Board of the City of Alexandria, Virginia,* 278 F.2d 72 (4th Cir. 1960), that separate geographic attendance areas for Negro and white pupils—the dual racial zone systems—must be abolished. The principle is well settled.[23] It has simply not been applied in these cases. Other plans before the court dutifully recite that they "abolish" the dual racial zones, but leave all the pupils placed in schools to which they were assigned by such dual zones. The plans which place pupils in schools on a racially segregated basis contain varying transfer arrangements. None of them are adequate. It was long ago settled in this Circuit,[24] and the other circuits which considered the matter,[25] that Negro pupils thus racially placed may not be subjected to criteria limiting their transfers to white schools on grounds not applicable in routinely placing white pupils in the white schools. Yet, such ar-

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[23] It is equally clear that segregated "feeder school" systems are unconstitutional. *Greene* v. *School Board of City of Roanoke,* 304 F.2d 118, 120 (4th Cir. 1962).

[24] *Mannings* v. *Board of Public Instruction of Hillsborough County,* 277 F.2d 370 (5th Cir. 1960); *Bush* v. *Orleans Parish School Board,* 308 F.2d 491(5th Cir. 1961).

[25] *Greene* v. *School Board of the City of Roanoke,* 304 F.2d 118 (4th Cir. 1962); *Marsh* v. *County School Board of Roanoke County,* 305 F.2d 94 (4th Cir. 1962); *Wheeler* v. *Durham City Board of Education,* 309 F.2d 630 (4th Cir. 1962); *Northcross* v. *Board of Education of City of Memphis,* 302 F.2d 819 (6th Cir. 1962); *Norwood* v. *Tucker,* 287 F.2d 798 (8th Cir. 1961).

rangements continue in these cases. It is equally clear that even relatively "free" transfer plans are inadequate if they are superimposed upon initial placements based on racial segregation.[26]

The few plans before the Court which do afford a modicum of choice to some of the pupils entering the school systems, all retain some continuing racial assignment practices, and all fail to contain adequate safeguards and procedures to insure that choices are really "free." All of the plans, for example, are silent on a whole range of administrative and operational concerns which must be considered in any rational plan to desegregate a school system.[27] The failure of the plans to grapple with these issues

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[26] *Singleton* v. *Jackson Municipal Separate School District,* 355 F.2d 865, 871 (5th Cir. 1966); *Bradley* v. *Board of Education of the City of Richmond,* 345 F.2d 310, 319 n.18, (4th Cir. 1965), vacated on other grounds, 382 U.S. 103; *Wheeler* v. *Durham Board of Education,* 346 F.2d 729 (4th Cir. 1965); *Nesbit* v. *Statesville Board of Education,* 345 F.2d 333, 334 (4th Cir. 1965); *Buckner* v. *School Board of Greene County,* 332 F.2d 452 (4th Cir. 1964).

[27] The Alabama school boards have filed a brief on rehearing relying on *Clark* v. *School Board of City of Little Rock,* 369 F.2d 661 (8th Cir. 1966) (rehearing petition pending). But every plan now before this Court is defective under the standards adopted by the Eighth Circuit in that case. With one exception, discussed below, the court endorsed a freedom of choice plan modeled on the new Guidelines.

The *Clark* court required "a positive program aimed at ending in the near future the segregation of the teaching and operating staff" although 52 teachers were teaching in minority situations. None of the plans before the court in these cases directs itself to the issue of faculty desegregation much less contains the "definite program" required in *Clark* (369 F.2d at 669, 670). There has been no actual faculty desegregation in any of these Alabama or Louisiana cases.

The *Clark* court rejected the notice provision of the Little Rock plan because it "only requires a limited public notice and the delivery of notice to the student by the classroom teacher." The Court held: "only by thorough notice can we be assured that the students and parents in Little Rock are fully aware of their newly accorded rights." The *Clark* court commended the HEW Guidelines to the board (369 F.2d at 668, 669). The notice provisions of the plans before this Court do not even come

speaks eloquently of their implicit purpose to minimize desegregation and maintain as much of the segregated systems as the courts will tolerate for as long as possible.

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up to the level of those of the Little Rock Board which the Eighth Circuit rejected much less comport with the Guidelines.

The *Clark* court rejected a challenge to the Little Rock Free Choice Plan based on the fact that the system had once allowed a delay in desegregation to put a zone plan into effect and provisionally accepted such a plan "that accords with the H.E.W. guidelines and provides a meaningful annual choice. . . ." Appellees can find scant consolation in such a holding. The *Clark* court approved, with one exception, exactly what the Guidelines provide and what the panel in these cases decreed, a plan whereby dual zones are abolished, choice is mandatory for all students, where a request for reassignment must be granted save in one circumstance, that of overcrowding, and where subsequent reassignment must be based on residence. None of the plans before the court meet these standards.

The only portion of the *Clark* holding which varies from free choice as defined by the Guidelines is that which rejects the necessity of *mandatory and annual* free choice in Little Rock.

The critical passage in the Court's opinion in *Clark* rejects a mandatory annual free choice requirement as follows:

> In the plan before us the students are required to choose before entering the first, seventh and tenth grades. They are not, however, "locked" to their initial choice. They are afforded an annual *right* to transfer schools if they so desire. The failure to exercise this right does not result in the student being assigned to a school on the basis of race. Rather, the student is assigned to the school he is presently attending, by reason of a choice originally exercised solely by the student. (Emphasis in original.)

Rehearing has been sought by plaintiffs on the ground, among others, that facts overlooked by the court render the last sentence of the quoted passage inaccurate.

In short, the court concluded that the annual voluntary "right" to obtain transfer constitutes a sufficient desegregation plan because it permits Negro students to seek annual placement in a desegregated school on similar terms to the mandatory free choice which takes place in the first, seventh, and tenth grades, the only distinction between the two being that in the first, seventh, and tenth grades all students choose schools rather than only those seeking transfer. Because all transfer applications must be granted, absent overcrowding, the court found that a real, unencumbered and not illusory opportunity for admission to a desegregated school exists for those who desire it.

The plans before this Court do not clearly provide for even the absolute right to transfer much less the free choice system operating in the 1st, 7th and 10th grades in Little Rock.

None of the plans directs itself to desegregation of faculty and staff personnel. *Bradley* v. *Board of Education,* 382 U.S. 103.

None of the plans directs itself to the issue of location and construction of new schools although there is no more critical set of decisions affecting the practical impact of assignment procedures in either changing or preserving the segregated situations which the boards have created. We have appended to this Brief a lengthy discussion of this vital topic and related matters, in an excerpt from the recently published study by the U. S. Commission on Civil Rights, RACIAL ISOLATION IN THE SCHOOLS (1967). See Appendix *infra.* This is an issue of transcendant importance in the reform of segregated systems.

None of the plans directs itself to elimination of discrimination in extra-curricular activities, such as, athletic events, meetings, special education programs and use of fields, physical plants and other facilities.

None of the plans directs itself to elimination of tangible inequalities in former Negro schools such as overcrowding, high teacher and pupil classroom ratios, inadequate curriculum, and substandard buildings, although some of the records before the court show dramatic discrepancies between Negro and white schools and maintenance of unequal facilities has been unconstitutional long before 1954. Few if any of these school systems could even pass muster in a scrupulous application of the discarded "separate but equal" doctrine.

None of the plans provides for more than "a limited public notice," *Clark* v. *School Board of the City of Little Rock,* 369 F.2d 661, 668, 669 (8th Cir. 1966), of publication in a newspaper of general circulation in the community. Given the long "established pattern of attending segregated

public schools" and the "new and unfamiliar system" the form of notice is of critical practical significance for "only when the affected persons are aware of their rights can we be assured that they are making independent and informed choices." (*Ibid.*) None of the plans provides for a simple and straightforward explanation of the plan, and the rights of school children and parents, to be delivered directly to individual parents and children.

The restrictive nature of the plans is demonstrated by the fact that with desegregation certain of these districts have actually decreased the period of time in which students are able to request transfers. Such procedures are not reasonably designed to facilitate change; they are designed to minimize change of the segregated *status quo.*

None of the plans provides for the desegregation of transportation services although many of the records before the court show operation of wasteful dual bus systems functioning to perpetuate segregation.

None of the plans requires periodic progress reports to the courts, although the continuing supervisory responsibility of the federal courts to insure racially nondiscriminatory school systems emanates explicitly from *Brown* v. *Board of Education,* 349 U.S. 294, 301 (1955). Plainly, periodic reports are necessary for the courts to perform a useful supervisory role in appraising the practical impact of desegregation plans.

It seems to us that regardless of one's view of the H.E.W. Guidelines, or the relevance of northern school cases, or the vitality of the *Briggs* v. *Elliott* dictum,[28] the plans under consideration must be held inadequate. They are defective because they do not afford "a racially nondiscriminatory school system," *Brown* v. *Board of Educa-*

[28] 132 F. Supp. 776 (E.D. S.C. 1955); discussed below, note 35, *infra.*

tion, 349 U.S. 249, 301. A plan which does not address itself to the facts of school system life in a considered and businesslike way does not begin to discharge a board's constitutional obligation.

II.

The Recent Decision of the Court of Appeals for the Tenth Circuit Demonstrates the Soundness of the Panel's Opinion and Decree.

Subsequent to the decision of the panel, on December 29, 1966, the Court of Appeals for the Tenth Circuit considered and decided kindred issues in *Board of Education of Oklahoma City* v. *Dowell,* No. 8523, January 23, 1967. We believe this case is of special significance to the consideration of these cases and merits detailed discussion.

After the Supreme Court's 1955 decision in *Brown* v. *Board of Education,* 349 U.S. 297, the Oklahoma City School Board undertook to redraw school boundaries to eliminate duality of zones based on race. At the same time the board adopted a "minority-to-majority" racial transfer policy which was maintained through 1963 when invalidated under *Goss* v. *Board of Education of Knoxville,* 373 U.S. 683. The new zones generally conformed to racial residential patterns, and residential segregation was customary and had been legally supported by statute and court enforcement in Oklahoma City. In 1964, out of a total Negro school population of 12,503 about 10,000 or 80% attended all-Negro schools.

The district court found that the board had "failed to desegregate the public schools in a manner so as to eliminate either the tangible elements of the segregated system, or the violation of the constitutional rights of the plaintiffs and the members of their class" *Dowell* v. *Board of*

Education of Oklahoma City, 244 F. Supp. 971, 976 (W.D. Okla. 1965). As a remedy for the failure of the board to take sufficient affirmative action to correct the effects of segregation, the court ordered, after receiving the report of a group of educational experts, a compensatory transfer plan:

> a "majority to minority" transfer policy which would turn the old "minority to majority" policy inside out. The "majority to minority" policy would permit an elementary school pupil, if he were in a majority group, to transfer to a school in which he was in a minority. Thus if the attendance area for a school was predominantly Negro (over 50%), Negro pupils could transfer out. However, the Negro pupils could transfer only to schools in which they would be in a minority, i.e., white schools (over 50%).

(Compare this with a similar suggested policy in the H.E.W. Guidelines, 1966, §181.33(b)).

School consolidation:

> Each of the old districts now maintains a school including the seventh through the twelfth grades. Upon consolidation, each of the two new districts would maintain two schools in the existing facilities, one for the seventh through the ninth grades and the other for the tenth through the twelfth grades. The combination of Harding and Northeast would produce a racial composition of 91% white and 9% non-white; the combination of Classen and Central would produce a racial composition of 85% white and 15% non-white. The present racial compositions in the four schools are: Harding 100% white, Northeast 78% white, Classen 100% white and Central 69% white.

Faculty desegregation:

> Desegregation of all faculty personnel, i.e., central administration, certified nonteaching and teaching personnel, so that by 1970, the ratio of whites to non-whites assigned in each school of the defendants' system will be the same, with reasonable leeway of approximately 10%, as the ratio of whites to non-whites in the whole number of certificated personnel in the Oklahoma City Public Schools.

Faculty workshops:

> In-service education of faculty including (1) City-wide workshops devoted to school integration, (2) special seminars.

The Court of Appeals affirmed, *Board of Education of Oklahoma City* v. *Dowell,* No. 8523, 10th Cir., Jan. 23, 1967.[29] The court approved the "majority-to-minority" transfer plan because it "would enable any Negro student in the system who so desires to enjoy the desegregated education to which he has long been entitled and yet of which he has been inexcusably deprived. In view of the long wait the Negro students in Oklahoma City have been forced to endure after their rights had been judicially established we think that requiring the new transfer plan was within the court's power to eliminate racial segregation." [30]

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[29] The district court decree was modified to exclude in-service workshops, seminars and clinics from the plan, the court being of the opinion "such a program may very well be a desirable and worthwhile effort but we are unable to say that compelling such action is necessary for the elimination of the unconstitutional evils sought to be corrected by the decree" (Typewritten opinion, p. 25). The school board's rehearing petition is now pending.

[30] Typewritten opinion p. 25.

In support of the definite faculty desegregation standards of the decree the court found "the existing situation reflects racial discrimination in the assignment of teachers and other personnel. The order to desegregate faculty is certainly a necessary initial step in the effort to cure the evil of racial segregation in the school system." [31]

In support of the consolidation of school districts the court stated: "It is obvious this part of the plan would result in a broader attendance base and in a better racial distribution of pupils." [32]

The court concluded:

> It must be conceded Oklahoma City not unlike many other similarly situated localities has a problem and that problem must be faced up to. Delays and evasiveness will not aid in its solution. This Court certainly cannot say the methods of solution proposed by the panel of experts and embraced by the decree are the only and the best ones. It may very well be necessary for the board to inaugurate new and additional procedures to overcome the unconstitutional evil of racial discrimination.[33]

The Oklahoma School Board made most of the substantive legal arguments made by appellees here. They were all rejected. The Tenth Circuit found that language in northern school cases where there was no legal segregation about there being no duty to remedy racial imbalance is clearly inapplicable to a southern school system which brought about segregation and inherent inequality of schools by state action. The *Briggs* v. *Elliott,* 132 F. Supp. 776 (E.D. S.C. 1955) dictum was rejected and the court

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[31] *Id.* at p. 22.

[32] *Ibid.*

[33] Typewritten opinion p. 25.

found that a plan which promotes or gives rise to continued segregation or token desegregation is not good faith compliance with a board's constitutional duty under *Brown* v. *Board of Education,* 347 U.S. 483. Although the Oklahoma City school system had a far greater degree of desegregation than any of the systems before this Court, the district court's plan was affirmed because the system was not reorganized in such a way as to disestablish the segregated system and to maximize the degree of desegregation.

Both the reasoning and language of *Dowell* undisputedly stand for the proposition that a school board which has operated as a legally compelled segregated school system is under a duty to reorganize that school system in such a way as to maximize the degree of desegregation.

III.

The Adequacy of Freedom of Choice Plans Must Be Determined in the Context of Particular Cases.

The decree prepared by the panel of this Court and appended to the December 29, 1966, opinion in these cases orders school boards to implement free choice desegregation plans, which are designed with specific safeguards. However, the court has stated that free choice plans may have inherent shortcomings and that in some circumstances they may be invalid. Thus, the decree "contemplates . . . continuing judicial evaluation of compliance by measuring the performance . . . of school boards in carrying out their constitutional obligation 'to disestablish dual, racially segregated school systems and to achieve substantial integration within such systems.' " (Slip opinion, p. 115.)

We urge that the entire Court adopt this view. The adequacy of free choice, or any other method of desegregation, must be appraised in terms of its practical consequences and practical impact on the segregated systems established by the states. They must also be appraised in the light of other reasonably available alternative methods of reforming segregated systems into nondiscriminatory systems. Such plans must not be judged merely as abstract documents as if they were facially valid and presumptively valid laws. School boards bear the burden of showing that their plans are reasonably designed to reform school systems which are in fact segregated as the result of unconstitutional laws and practices. The probable and actual effects of such plans must be considered if the courts are to exercise the requisite "practical flexibility in shaping . . . remedies." *Brown* v. *Board of Education,* 349 U.S. 294, 300. Desegregation plans must be viewed against the educational and social background which prevails in the communities. Actual experience and performance are the relevant guides in appraising their adequacy.

The majority opinion of the panel has pointed out various problems presented by free choice plans. We direct the Court's attention specifically to the material in the Court's footnote 110, slip opinion, p. 98; we set out verbatim in the note below the U. S. Civil Rights Commission appraisal of freedom of choice plans in operation.[34] We add a few

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[34] The Court's footnote reads as follows:

Rep. U. S. Comm. on Civil Rights, Survey of School Desegregation in the Southern and Border States—1965-66, p. 51. "Freedom of choice plans accepted by the Office of Education have not disestablished the dual and racially segregated school systems involved, for the following reasons: a. Negro and white schools have tended to retain their racial identity; b. White students rarely elect to attend Negro schools; c. Some Negro students are reluctant to sever normal school ties, made stronger by the racial identification of their schools; d. Many Negro children and parents in Southern States, having lived

observations of our own. Free choice plans in effect permit private individuals to perpetuate a substantially segregated school system by direct physical or economic coercion, or by subtly and indirectly expressed hostility which may be equally effective. The states having created a segregationist momentum through compulsive laws, suddenly abdicate their traditional responsibility for assigning pupils to schools. The pattern has become familiar in race relations litigation. When official discrimination is outlawed, the old practices are sought continued by so-called private arrangements. Similar "hands off" policies by the states in favor of private control were attempted in efforts to preserve the white primaries. *Nixon* v. *Herndon,* 273 U.S. 536; *Nixon* v. *Condon,* 286 U.S. 73; *Smith* v. *Allwright,* 321 U.S. 649; *Elmore* v. *Rice,* 72 F. Supp. 516 (E.D. S.C. 1947), affirmed, *Rice* v. *Elmore,* 165 F.2d 387 (4th Cir. 1947), cert. den. 333 U.S. 875; *Baskin* v. *Brown,* 174 F.2d 391 (4th Cir. 1949). Note the comparable development with housing discrimination, from racial zoning laws, *Buchanan* v. *Warley,* 245 U.S. 60, to restrictive covenants, *Shelley* v. *Kraemer,* 334 U.S. 1; *Barrows* v. *Jackson,* 346 U.S. 249. Such efforts reached an apogee of absurdity when the public cafeteria in the Arkansas State Capitol building was suddenly converted to a white-only "private club" a few days after the Civil Rights Act of 1964 was enacted. *Sutton* v. *Capitol Club, Inc.,* No. LR-64-C-124, W.D. Ark., April 12, 1965, 10 Race Rel. L. Rep. 791.

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for decades in positions of subservience, are reluctant to assert their rights; e. Negro children and parents in Southern States frequently will not choose a formerly all-white school because they fear retaliation and hostility from the white community; f. In some school districts in the South, school officials have failed to prevent or punish harassment by white children of Negro children who have elected to attend white schools; g. In some areas in the South where Negroes have elected to attend formerly all-white schools, the Negro community has been subjected to retaliatory violence, evictions, loss of jobs, and other forms of intimidation."

Free choice plans are often profoundly influenced in operation by the coercive and influential effects of various state-established traditions of segregation which identify schools by race, including faculty assignments, tangibly inferior sites, and facilities and similar factors. The very fact that the states have thought it important to segregate faculties communicates to parents and pupils the idea that the race of a school's faculty should be considered in making choices. Cf. *Anderson* v. *Martin,* 375 U.S. 399. The multitude of forces and practical limitations imposed by generations of active planning to create a segregated system, include the location of schools, the arrangement of classes and grades in the schools, and the planning of the sizes of schools conveniently to accommodate one race. This segregated planning frequently makes segregation so convenient and desegregation so difficult that little reform can be expected by offering choices. Free choice plans sometimes give priorities among students based upon proximity to schools if schools become crowded. Therefore, free choice offers no promise of change in communities where crowded schools were planned to accommodate segregated neighborhood patterns. And, of course, governmental action has been profoundly influential in creating segregated housing patterns throughout the nation. Report of U.S. Commission on Civil Rights, Racial Isolation in the Public Schools (1967), pp. 21-22, 254-259. The Commission points out that Bessemer, for example, until recent years had racial residential zoning laws, notwithstanding that such laws were invalidated by the Supreme Court early in the century. *Buchanan* v. *Warley,* 245 U.S. 60. In *Jimerson* v. *City of Bessemer,* Civil No. 10054, N.D. Ala., Aug. 3, 1962, the district court noted that Bessemer had repealed its racial zoning ordinance "several years ago." And cf. *City of Birmingham* v. *Monk,* 185 F.2d 859 (5th Cir. 1950),

cert. denied 341 U.S. 940, involving a racial zoning law. And see, *Dowell* v. *School Board of Oklahoma City,* 244 F. Supp. 971, 975-976 (W.D. Okla. 1965), affirmed No. 8523, 10th Cir., Jan. 23, 1967.

The factors which may make a free choice plan ineffective include the unavailability of transportation. Bus routes may trace the boundaries of the theoretically abolished dual school system. School boards may refuse to furnish transportation to attend desegregated schools. Free choice may be restricted by the school authorities' determinations of what constitutes overcrowding. Free choice plans may be inconsistent with the school authorities' duty to equalize the opportunities of children in schools by not countenancing tangible inequalities or some schools standing half empty while others nearby are on double shifts. A responsible school board, not intent on accommodating racial segregation, would assign students in such situations to equalize the use of facilities. The free choice plans make no such adjustments. Such inefficiencies and inequalities were common to the dual systems and the free choice plans continue to tolerate them.

We agree with the majority of the panel that the school boards owe a duty to "disestablish segregated systems," to "desegregate," and to "integrate" the schools. We suggest that the school board arguments about this terminology —the arguments that "there is no duty to integrate"— all stem from their scarcely concealed desire to do as little as possible to change the *status quo.* We believe the majority of the panel has fully and adequately treated this subject and the dictum in *Briggs* v. *Elliott,* 132 F. Supp. 776 (E.D. S.C. 1955). We add only a historical footnote about *Briggs* and the historic Clarendon County litigation. The footnote shows among other things that at least in

Clarendon County, S. C. the *Briggs* dictum has no continuing vitality in the law.[35]

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[35] A chronological recapitulation of the Clarendon County, S. C., litigation may give added perspective to the *Briggs* dictum. The first opinion in the case, *Briggs* v. *Elliott,* 98 F. Supp. 529 (E.D. S.C. 1951), held that South Carolina's school segregation laws were valid and that "federal courts are powerless to interfere" with segregation of the races in public schools (98 F. Supp. at 532). The majority opinion by Circuit Court Judge Parker, joined by Judge Timmerman, said that "it is a late day to say that such segregation is violative of fundamental constitutional rights" (98 F. Supp. at 537). The majority did find that the Clarendon schools for Negroes were not equal, and issued an injunction requiring the board to equalize educational facilities. District Judge Waring dissented arguing that segregation in public education violated the Fourteenth Amendment (98 F. Supp. at 538-548). The plaintiffs appealed to the Supreme Court which vacated the judgment to obtain the trial court's views on progress made in the equalization program. *Briggs* v. *Elliott,* 342 U.S. 350. On remand, the district court again refused an injunction against segregation. *Briggs* v. *Elliott,* 103 F. Supp. 920 (E.D. S.C. 1952). (Circuit Judge Dobie replaced Judge Waring on the panel when the latter retired.) Plaintiffs' second appeal, consolidated with other cases, resulted in the decisions in *Brown* v. *Board of Education,* 347 U.S. 483; 349 U.S. 294.

The *Briggs* opinion, reported in 132 F. Supp. 776 (E.D. S.C. 1955), was announced July 15, 1955. A transcript of the proceedings on that day is published in *Southern School News,* Vol. II, No. 2, August 1955, pp. 6-9. The court convened to issue an order in accordance with the mandate in *Brown.* When the court opened, Judge Parker read the opinion reported in 132 F. Supp. 776. Having rendered the opinion, the court then invited counsel to submit their proposals for the decree on the mandate. The school board submitted a petition for delay and sought permission to run the schools on a segregated basis during 1955-56. An argument on the time for desegregation ensued. This was the only issue discussed, there being no desegregation plan before the court, and no issue before the court about the adequacy of any particular method of desegregation. Finally, the court entered a general decree restraining the board from refusing on account of race to admit children to schools "from and after such time as they have made the necessary arrangements for admission . . . on a nondiscriminatory basis with all deliberate speed. . . ."

Segregation continued in the county schools for another decade. When some of the original plaintiffs and other Negroes brought another suit against the county system a district judge, relying on the *Briggs* dictum, dismissed their suit. *Brunson* v. *Board of Trustees of School Dist. No. 1,* 30 F.R.D. 369 (E.D. S.C. 1962). The Court of Appeals reversed, ignoring the arguments based on the *Briggs* dictum. *Brunson* v. *Board of*

IV.

The Adoption of a Uniform Decree Is Essential.

In *Brown* v. *Board of Education,* 349 U.S. 294, the Supreme Court recognized the right of Negro plaintiffs to:

> ". . . [A]dmission to public schools as soon as practicable on a non-discriminatory basis. To effectuate this interest may call for elimination of a *variety of obstacles* in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954 decision." 349 U.S. at 300 (emphasis supplied).

A school generation has past since *Brown* II was decided. The fact situations raised in these appeals, in common with fact situations commonly confronted by this Court, dramatically represent the "variety of obstacles" which have effectively perpetuated racially segregated schools. These "obstacles" include: pupil assignments based upon race; inadequate notice; construction programs designed to perpetuate segregation; segregation of facilities, activities and programs; segregated transportation; and, segregated teaching and administrative staffs. The wholesale failure of the school boards to assume and forth-

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Trustees, 311 F.2d 107 (4th Cir. 1962). A decade after *Brown,* the district court ordered the county white schools to admit Negro plaintiffs, and required a desegregation plan. *Brunson* v. *Trustees of School Dist. No. 1,* 244 F. Supp. 859 (E.D. S.C. 1965).

Meanwhile, other litigation was commenced against a school jurisdiction within Clarendon County in August 1965. The District Court enjoined segregation and directed the school board to submit a desegregation plan, suggesting that the board follow the 1966 HEW Guidelines. *Miller* v. *School District No. 2, Clarendon County, S. C.,* 253 F. Supp. 552 (D. S.C. 1966). A subsequent opinion invalidated the school board's first proposals. *Miller* v. *School District, etc.,* 256 F. Supp. 370 (D. S.C. 1966). The litigation continues.

rightly carry out the task of eliminating racial segregation within their school districts left Negro plaintiffs no alternative but litigation. This litigation should not have been necessary. Once commenced it should not be endless. At a minimum district courts, school authorities, and the tens of thousands of Negroes represented by plaintiffs in school desegregation litigation throughout this Circuit are entitled to a clear statement of the essential features which every plan must encompass to remove the "obstacles" to enjoyment of the right to an equal and desegregated education guaranteed Negro students by the Fourteenth Amendment—"obstacles" which the Supreme Court recognized must be destroyed twelve years ago.

The panel adopted a uniform decree to be entered by the district courts. The provisions of the decree are intended, at least transitionally, to apply uniformly throughout this circuit in cases[36] involving plans based upon freedom of choice absent exceptional circumstances which compel modification. "The substantive requirements of the decree derive from the Fourteenth Amendment as interpreted by decisions of the Supreme Court and of this Court, in many instances before the HEW Guidelines were published. For administrative details, we have looked to the Office of Education." (Slip Opinion, p. 112.) Appellants support the application of these minimum standards because without them orderly progress of court ordered school desegregation on a broad scale is impossible, further denial of Negro students rights is inevitable and countless district and circuit court proceedings are fore-

[36] 128 school desegregation cases were docketed at the time the briefs were filed with this Court prior to the May 24, 1966 hearing. Volume I, Appendix to Briefs of the United States.

ordained[37]—to consider administrative minutiae—unless a uniform decree is entered by this Court.

The finding of the panel that "case by case development of the law is a poor sort of medium for reasonably prompt and uniform desegregation" is undisputable.[38] (Slip Opinion, p. 23.) A comprehensive and uniform decree, therefore, will provide invaluable assistance to district courts in fulfilling their responsibility to require the reorganiza-

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[37] Note the frequency of appeals of school desegregation orders in this circuit:

Number of cases with one or more appeals	42
Number of cases with two or more appeals	21
Number of cases with three or more appeals	8
Number of cases with four or more appeals	4
Number of cases with five or more appeals	2

(Volume I, Appendix to Briefs of the United States, in these cases.)

[38] This conclusion is supported by the statement of this Court in *Davis* v. *Board of School Commissioners of Mobile County,* 364 F.2d 896, 898 (5th Cir. 1966):

> This is the Fourth appearance of this case before this court. This present appeal, coming as it does from an order of the trial court entered nearly eighteen months ago, on March 31, 1965, points up, among other things, the utter impracticability of a continued exercise by the courts of the responsibility for supervising the manner in which segregated school systems break out of the policy of complete segregation into gradual steps of compliance and towards complete compliance with the constitutional requirements of *Brown* v. *Board of Education,* 347 U.S. 483. One of the reasons for the impracticability of this method of overseeing the transitional stages of operations of the school boards involved is that, under the Supreme Court's "deliberate speed" provisions, it has been the duty of the appellate courts to interpret and reinterpret this language as time has grown apace, it now being the twelfth school year since the Supreme Court's decision. Another is that appellate court requirements have grown more exacting as time has passed, and during the last eighteen months pronouncements of this court have interpreted the Supreme Court's interim decisions as requiring considerably greater measures of desegregation. Thus a decision by a trial court eighteen months ago is not likely to reflect the current law on the subject.

tion of segregated school systems under *Brown.* Such a decree as adopted by the panel provides a distillation of the experience with desegregation of the courts, the Executive branch, educators and administrators. As recognized by this Court in the past, failure to adopt such a decree will encourage litigation by recalcitrant school boards. "If judicial standards are lower than H.E.W. standards, recalcitrant school boards in effect will receive a premium for recalcitrance; the more the intransigence, the bigger the bonus." [39] Uniformity avoids totally different rates of desegregation in communities with identical traditions and provides Negroes with a definite understanding of what they can expect and district courts with what they must require from school authorities. It insures that desegregation plans will encompass the minimum range of administrative and planning functions which must be reorganized if the unlawful segregated system is to be disestablished. The right to show that certain of the uniform provisions are not locally appropriate was properly reserved to school boards.

Appellees make elaborate arguments in support of the claim that it was inappropriate for the panel to follow the H.E.W. Guidelines. These arguments are founded on the claimed unconstitutionality of the Guidelines and the claim that the Guidelines do not comport with the 1964 Civil Rights Act. These arguments are for the most part irrelevant. The Guidelines provide nothing more or less than administrative procedures designed to accomplish the undisputed obligation of this Court—namely, the destruction of "obstacles" to Negro pupils' enjoyment of their right to

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[39] *Singleton* v. *Jackson Municipal Separate School District, et al.,* 348 F.2d 729, 731 (1965).

an equal and desegregated education. The 1964 Civil Rights Act, in terms, clearly does not limit or otherwise effect the judicial obligation to protect these constitutional rights: "Nothing in this Title should effect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education." Civil Rights Act of 1964, section 409. The majority opinion of the panel is persuasive in explaining the propriety of reliance upon the educational expertise which the Guidelines reflect. In adapting techniques and procedures from the Guidelines to a judicial decree the panel exercised "practical flexibility in shaping . . . remedies." *Brown* v. *Board of Education*, 349 U.S. 294, 300.

CONCLUSION

Wherefore, intervenors and appellants pray that the judgments of the courts below be reversed for the reasons set forth in the December 29, 1966, opinion of this Court and that decrees be entered in accordance with that opinion.

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APPENDIX

APPENDIX A

Excerpts From Racial Isolation in the Public Schools (U.S. Comm. on Civil Rights, Vol. I, pp. 39, 59-71).

Educational Policies and Practices

Although residential patterns and nonpublic school enrollment in the Nation's cities are key factors underlying racial concentrations in city schools, the policies and practices of school systems also have an impact. These policies and practices are seldom neutral in effect. They either reduce or reinforce racial concentrations in the schools.

Underlying all policy and practice is the method that the school system uses in determining which children particular schools shall serve. While there are exceptions and variations, the method most commonly used in city school systems is that of geographical attendance zoning.

* * *

Southern and Border State Schools

School segregation in the Southern and border States was sanctioned by law until the 1954 *Brown* decision. As the elements of legal compulsion have been removed, the causes of racial isolation in Southern and border city schools have become more complex. Today it is attributable to remnants of the dual school system, methods of student assignment, residential segregation, and to those discretionary decisions familiar in the North—site selection, school construction, transfers, and the determination of where to place students in the event of overcrowding.

Geographical Considerations

Residential Segregation.—After the *Brown* decision, two main approaches to school desegregation were taken in Southern and border cities. The first was to convert the dual attendance zones, drawn according to race and sometimes overlapping, into single attendance zones without regard to race. Ostensibly, student assignment would then depend only on proximity and convenience. The second was to allow students some freedom of choice in their assignment. Common to the many variations of the free choice approach is the principle that if more students choose a given school than it can accommodate, first priority will be given those students living in the school's immediate area.

In all approaches to desegregation in Southern and border cities, then, residence is an important factor in determining school attendance. Since residential segregation generally is as intense in Southern and border cities as in Northern cities,[151] the racial composition of Southern and border city schools substantially reflects the pattern of residential segregation.

St. Louis is a case in point. There, the school administrators voluntarily complied with the *Brown* decision in 1954 by converting from dual to single attendance school zones over a two-year period.[152] The new attendance zones were established after carefully counting public school children on a block-by-block basis without regard to race.[153] Residential segregation was extensive, however,[154] and relatively few boundary changes were made in converting from dual to single attendance zones.[155] Most of the all-Negro school remained unchanged.[156] By 1965, 91 per-

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[151] See Taeuber and Taeuber, *supra*, note 49, 37. The mean residential segregation index for Southern cities is 90.9 for 1960, compared to 83.0 for cities of the North and West. The index for Cleveland is 91.3; for Nashville, 91.7. The index for Gary is 92.8; for Memphis, 92.0; the index for Tulsa is 86.3; for Buffalo, 86.5 *Id.* at 39–40.

[152] *St. Louis Study* 35 (1966).

[153] Valien, *The St. Louis Story, A Study of Desegregation*, 27–28 (1956); *St. Louis Study* at 6.

[154] In 1960, the index of residential segregation in St. Louis was 90.5. Taeuber and Taeuber, *supra*, note 49, at 33.

[155] According to a statement by the Superintendent of Schools, Dr. Philip G. Hickey, quoted on Sept. 4, 1955, in the St. Louis Post Dispatch, 62 out of 119 elementary school boundaries were changed in the conversion from a dual to a geographical zoning plan. An examination of the elementary school boundary lines in 1954–55, before desegregation, and in 1955–56, after redistricting, shows that there were very few changes in the formerly "white" districts. The "Negro" districts which reached out to cover the few Negroes living in the south and southeast were cut back to the Negro area. *St. Louis Study*, based on boundaries specified in the minutes of the Board of Education of St. Louis, 1954–55 and 1955–56.

[156] For high schools, see Valien, *supra*, note 153, at 38. The St. Louis Public School Department estimated in September, 1956, that 37 formerly all-white elementary schools would have Negro children in attendance and 13 formerly all-Negro elementary schools would have white pupils on their rolls. Thus, 73 of the 123 elementary schools would not be affected at all. See St. Louis Public Schools, *Desegregation of St. Louis Public Schools*, 45–47 (1956).

cent of the Negro elementary school children attended schools that were nearly all-Negro.[157]

Again in Memphis the new single attendance zones developed by the school board resulted in less than 1 percent of the student body attending school with children of the opposite race. In a suit brought against the school system, it was charged that school boundaries had been gerrymandered to perpetuate segregation.[158] An expert witness for the Negro plaintiffs showed how the boundaries could be redrawn based purely on nonracial considerations. Under this system of neutral boundaries, approximately 1,300 more children would have attended schools formerly serving the opposite race. Yet this still would have amounted to only slightly more than 1 percent of the total school enrollment.[159] Thus even if neutral boundaries had been drawn for Memphis, the extent of school desegregation would have been minimal because of the severe residential segregation in the city.

Residential patterns, however, important as they are, do not invariably determine the racial composition of Southern and border city schools. Under any system of student assignment in which place of residence plays an important role, school boards and administrators have discretionary powers that can intensify or reduce segregation. Their decisions often have served to reinforce and perpetuate racial isolation.

Site Selection.—As noted in the discussion of Northern schools, the location of new schools has a marked effect on patterns of isolation. Whether a school system uses geographical zoning, free choice, or a variation on these methods of assignment, a key determinant of the student racial composition is the location of the school.

At the time of the *Brown* decision, Southern educators were aware that the location of schools was an important factor in maintaining segregated school attendance patterns.[160] A story in a Memphis, Tenn., newspaper on May 18, 1954, is illustrative:

> Ruling Fails To Shock City: Officials See Little Difficulty
>
> School authorities in Memphis yesterday evidenced no surprise at the [Brown] decision. . . . Mr. Milton Bowers, Sr., President

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[157] *St. Louis Study,* at P–1 and P–2. "Racial Distribution of Pupils, St. Louis Elementary and Secondary Schools," based on St. Louis Public Schools Instruction Department, *The Status of Integration in the St. Louis Public Schools During the 1965–66 School Year; A Factual Report to the Board of Education,* November, 1965, and also the first supplement to that report dated October 1966.

[158] See *Northcross* v. *Board of Education* (Memphis), 333 F. 2d 661 (6th Cir. 1964).

[159] Testimony of Floyd L. Bass, transcript, vol. III, pp. 427, 462, and E. C. Stimbert, Superintendent of Schools, transcript, vol. II, p. 236, *Northcross* v. *Board of Education* (Memphis), *supra,* note 158. The total school enrollment was 105,637.

[160] *See Southern School News,* January 1955, p. 3. The Chairman of the State

Footnote continued on following page.

> of the Memphis Board of Education, said, "We have been expecting this to happen a long while. . . . We believe our Negroes will continue using their own school facilities since most of them are located in the center of Negro population areas. . . . [Negro schools are] fully equal to and in some instances better [than white schools]. We are very optimistic about this [ruling]." [161]

Throughout the 1950's, Southern cities made considerable investments in new school facilities. In Houston, almost every school constructed after 1955 was located in racially homogeneous residential areas. Of the 56 Negro schools in Houston in 1965, for example, 49 were newly built or enlarged in Negro residential areas after 1955.[162] One Negro enclave, entirely surrounded by white residential areas, had only five elementary schools in 1955. Instead of enlarging the capacity of schools ringing the Negro area to serve both Negro and white children, the system accommodated the growing Negro enrollment within the Negro area. By 1965, the five Negro elementary schools had been enlarged and three more elementary schools had been built within the Negro area. They remained all-Negro. Five of the seven white schools outside the Negro area were nearly all-white in 1965.[163] More school construction is

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Board of Education of Arkansas is quoted: "The only hope the schools have of maintaining segregation . . . (is to make Negro schools so attractive that) the Negroes will not demand integration. . . . However, if the districts build adequate facilities now, in most instances the new buildings will be located in Negro districts." See also Miss. Code Ann., tit. 24, secs. 6216–01 to 6672 (Supp. 1962) calling for equalizing Negro schools and reorganization of school systems throughout the State. The intent of the equalization program reportedly was to prevent desegregation. Aside from building new Negro schools, the program called for "relocation of many white schools according to student residences." *Southern School News,* February 1957, 13. See also, Atlanta Constitution, May 19, 1954, p. 6: "Reports from over the South indicated some areas may try to escape the impact of the antisegregation decree by 'zoning' schools in natural population patterns. . . ." See also Pierce et al., *White and Negro Schools in the South* at 297 (1955), where it was predicted that Southern schools would use districting powers to perpetuate segregation.

[161] Memphis Commercial Appeal, May 18, 1954, p. 1.

[162] Defendant's exhibit No. 3 and plaintiff's exhibit No. 2, *Broussard* v. *Houston Independent School District,* C.A. 66–H–445, S.D. Tex., June 7, 1966. See also U.S. Commission on Civil Rights, *Civil Rights, U.S.A., Public Schools, Southern States 1963, Texas,* 35–38. The Board first considered desegregation in 1955 and made it clear that it was postponing action until schools could be built to minimize the impact: "If the bond issue is submitted and approved by the voters and a construction program is carried out so as to give every section of the city reasonably equal and adequate school facilities and a liberal policy of transfer is continued so that no Negro student will be compelled to attend against his will a school predominantly white in student body and teaching staff, and no white child will be compelled against his will to attend a school predominantly Negro in student body and teaching staff, it is our opinion that such a course will be approved by the overwhelming majority of our people, both white and Negro, and our problems with reference to desegregation will largely be resolved." *Id.* at 37–38.

[163] Plaintiff's exhibit No. 2 and defendant's exhibit No. 3, *Broussard* v. *Houston Independent School District, supra* note 162. The new Negro schools were, Blackshear (which also received an addition), 100 percent Negro in 1965, and Lockhart, 100 percent Negro in 1965. Negro schools receiving additions only were: Dodson

Footnote continued on following page.

planned under a 1965 bond issue, and the Houston school superintendent has identified 16 of the 50 new projects as "for predominantly Negro schools." [164]

The pattern is similar in Atlanta. Since 1954, classroom space has for the most part been added in areas of high Negro concentration and schools have been constructed for white children in areas where few Negroes lived. Four high schools which opened in 1960, for example, were located almost at the city limits in virtually all-white areas.[165] During the current school year, two of the schools are 96 percent white; the other two are 100 percent white.[166] Atlanta's proposed 1966 school building program continues to emphasize construction in racially homogeneous residential areas. Three new elementary schools, two high schools, and additions to an elementary and two high schools are planned for Negro residential areas. There also are plans to purchase additional land for the expansion of one of the white high schools on the fringe of the city.[167]

This pattern is common throughout the South. As Table 10 shows, the great majority of Southern and border State elementary schools built

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(2 additions), Douglass (1 addition), J. W. Jones (1 addition), Dunbar (1 addition) and Turner (1 addition)—all 100 percent Negro in 1965. One new white school, Rusk (newly constructed in 1960), was 99 percent white in 1965. Montrose, Fannin, Lubbock, and Lantrip, existing white schools ringing the ghetto, were 99–100 percent white in 1965. Two other formerly all-white schools outside the ghetto, MacGregor and Southland, were 58 percent Negro and 32 percent Negro in 1965.

[164] Testimony of Dr. Glenn Fletcher, Acting Superintendent, Record, vol. II, p. 256, *Broussard* v. *Houston Independent School District*, C.A. *supra* note 162. Plaintiffs in this case (still in progress at this writing) are seeking to enjoin the system from constructing further schools in segregated residential areas. Brief for plaintiff, pp. 9–10, *Broussard* v. *Houston Independent School District*. Defendants base their argument on the educational desirability of neighborhood schools and the absence of legal requirement to take positive steps to achieve racial balance in the schools. Record, vol. V, p. 1173, *Broussard* v. *Houston Independent School District*. The pattern of placing new schools in racially homogeneous areas is maintained in the school system's plans for a building program to meet the anticipated growth in enrollment by 1970.

[165] For the racial composition of each new school facility constructed since 1954, see Clark College, *Race and Education in Atlanta*, a study prepared for the U.S. Commission on Civil Rights [hereinafter cited as *Atlanta Study*] 100–109. The four white high schools referred to in the text are Therrell, Dykes, East Atlanta, and George. (*Id.* at 29.) For a map of Negro residential areas in Atlanta, see *Atlanta Study*, overlays based on Atlanta Region Metropolitan Planning Commission, "Population and Housing" (1965).

[166] Information concerning the racial composition of Atlanta public schools as of September 1966 was obtained by the Commission staff from John W. Haldeman of the office of the Superintendent of Schools of Atlanta, by telephone interview on Nov. 4, 1966.

[167] *Atlanta Study* at 98. See also the Atlanta school board's *Proposed 1966 Building Program*, map, and list of proposed construction projects, distributed by the school board during the campaign for the 1966–67 bond issue.

or enlarged since 1950 are nearly all-white or nearly all-Negro.[166] In San Antonio, six of the city's seven nearly all-Negro elementary schools were built or enlarged since 1950; in Houston, 42 of the city's 44 Negro elementary schools were built or enlarged since 1950.

TABLE 10.—*Elementary school construction in 11 Southern cities, 1950–65*

(a) City	(b) Number schools newly built or enlarged by addition	(c) Number opened 90–100 percent white and were 90–100 percent white in 1965	(d) Number opened 90–100 percent Negro and were 90–100 percent Negro in 1965	(e) Percent total Negro enrollment in 1965 attending schools listed in column (d)
Nashville	46	36	9	58.7
Tulsa	50	41	6	54.7
San Antonio	57	43	6	59.0
Richmond	20	7	12	58.8
Lexington, Ky	9	3	2	49.7
Knoxville	19	13	5	68.8
Dallas	106	79	11	44.3
Houston	133	87	42	91.5
Baltimore	74	13	35	42.3
Atlanta	63	25	34	70.3
Kansas City, Mo	31	12	6	25.6

Not only did most of these schools open almost totally segregated but they remained so in 1965. In Richmond, this was true for all but one of the new elementary schools constructed or enlarged since 1950. In Atlanta, it was true for all but four schools. In Nashville, 59 percent of the total Negro elementary enrollment attended schools that were almost entirely Negro at the time of construction and remained so in 1965. In Knoxville, the figure was 69 percent and in Houston 92 percent.

School Size.—In addition to the selection of sites for new schools, decisions on school size are important. The size of a school determines the number of children who may attend, whether or not the school assigns students strictly on the basis of geographic zoning. Although a school may be located where it is possible to draw a racially mixed student body, its size may so limit the area it can serve that it will be segregated. A school in a Negro enclave surrounded by whites, for instance, could be constructed large enough to accommodate both the Negro and white children, or so small that it could serve only the Negro children in the enclave.

[166] All school construction and enrollment data from official school documents for each system listed in the table. In St. Louis, of the 45 elementary schools built since 1954 or enlarged by addition since 1961, 4 were 10 to 90 percent Negro in 1965. Four are known to have opened less than 10 percent Negro and to have remained so, and 21 opened more than 90 percent Negro and remained so. Forty percent of the 1965 Negro elementary enrollment attended these 21 schools. The racial composition of 15 of the 45 schools at the time construction was completed is unknown. Thirteen of these were more than 90 percent Negro in 1965. *St. Louis Study*, exhibits E–5, E–6 and P–1 and P–2.

Size also is a consideration when school officials must decide which schools should be enlarged and what their enlarged capacity should be. These decisions can determine a school's racial composition. For example, the Sojourner Truth Elementary School in San Antonio opened in 1950 as a 192-pupil school to serve a very small Negro residential area completely surrounded by whites. Four blocks away was a white school, Hidalgo. In 1959, Hidalgo was enlarged, but only enough to accommodate its nearly all-white student body. In the 1959 school year, Hidalgo enrolled 346 students, 2 of whom were Negroes. Sojourner Truth, which was not enlarged, remained all-Negro.[169]

The Sam Hill Elementary School, in Knoxville, is another example of the effects of decisions regarding school size. The school was built in 1952 to serve a small Negro area. In 1958, in order to contain an expanding Negro population, it was enlarged to a capacity of about 400. Yet two blocks away was the all-white Londale Elementary School, which in 1960 was underenrolled by over 100 pupils. In 1965 Sam Hill remained all-Negro, and Lonsdale was 98 percent white.[170]

Grade Structure.—Another factor determining the racial composition of a student body is the number of grades accommodated by the school. Ordinarily, the fewer the grades the narrower the age limits and the larger the geographical area that can be served. Conversely, the more grades taught at a school the smaller the area it will serve. There have been a number of instances in Southern and border cities where schools have served more grades than is customary and this deviation from normal school practice has had the effect of preserving school segregation.

The Meigs School in Nashville serves grades 1 to 12. It is the only school in the city serving 12 grades. Most Nashville schools are organized on a 6–3–3 or an 8–4 pattern. The school is located in a small Negro area and was all-Negro in 1965.[171]

The Dunbar Junior-Senior High School in Lexington, Ky., is the only secondary school in the city that combines a junior and senior high school. It is located in a Negro area and serves an all-Negro student body, comprising 80 percent of all Negro secondary students in the city. Since 1949, it has been enlarged twice to accommodate its all-Negro enrollment.[172]

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[169] School data from San Antonio school system. Racial composition of neighborhoods for San Antonio, and for cities referred to in notes 170–172 *infra*, from U.S. Bureau of Census, *U.S. Census of Housing: 1960*, Series HC(3).

[170] School locations from *Dolph's Map of Greater Knoville, Tenn.* Other data supplied by the Knoxville school system.

[171] School locations from *Arrow Official City Map; Greater Nashville, Tenn.* Other data supplied by the Nashville school system.

[172] School locations obtained from U.S. Office of Education. Other data supplied by the Lexington school system. The J. N. Ervin School (all-Negro) in Dallas is

Footnote continued on following page.

Thus the location, size, and grade structure of school facilities can be key factors in determining a school's racial makeup. Decisions on location, size, and grade structure of school facilities often have served to perpetuate racial separation in Southern and border State schools. In addition, the manner in which free choice systems have been administered sometimes has contributed to school segregation.

Free Choice Provisions

Under the free choice plans prevalent in the South, students generally are permitted or required to state a preference for the schools they wish to attend. If more students choose a given school than it can accommodate, priority typically is given to students who reside in the immediate area. Thus, geographical considerations may influence the racial composition of the schools even under free choice plans. Under these plans, however, considerations unrelated to geography also determine racial composition. In Houston, for example, although dual attendance areas officially are abolished, children automatically are re-enrolled in schools they previously attended under the system of dual boundaries, and their younger brothers and sisters also are given preference at these schools. Other children are permitted to enroll only if there is space to accommodate them. The fact that a Negro child may live closer to a white school than some of the white children does not guarantee that he will be accepted.[173]

Even where race is not a factor in the initial school assignment of children, school officials may influence the exercise of choice in ways that intensify segregation. In Atlanta, the superintendent of schools sent a letter to the parents of children in the Kirkwood School (100 percent white), which was located in an area becoming all-Negro, notifying them that Negroes were being permitted to transfer to Kirkwood. The white children transferred elsewhere and the Kirkwood School, which had been all-white in 1964, was all-Negro in 1965.[174]

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another example. It is the only school in the system serving 12 grades. It is located in a Negro area. The South Oak Cliff High School, grades 10–12, serving the adjacent white area had only 9 Negro children enrolled in 1965. Data supplied by the Dallas school system.

[173] *Broussard* v. *Houston Independent School District, supra* note 162, at 423–424; see also Houston Independent School District, *Superintendent's Bull.*, Aug. 4, 1966.

[174] Atlanta Journal, Feb. 15, 1965, p. 1. In a footnote to *Calhoun* v. *Latimer*, 10 *Race Rel. L. Rep.* 621 (1965), the Federal district court described the facts surrounding the change of the Kirkwood School from all-white to all-Negro, as follows: "A typical instance of [rapid changes in residential patterns] involved the Kirkwood Elementary School, formerly all-white, but in an area where the sudden and substantial influx of Negroes left the latter without adequate school facilities. The board allowed, but did not compel, white students to transfer to Wesley and Whiteford Elementary Schools, and gave a choice to the faculty of the Kirkwood School to remain or leave, and the principal of the latter with some other personnel, remained at the

Footnote continued on following page.

There are other factors that impede desegregation under free choice plans. A prerequisite to the exercise of free choice by white and Negro students would appear to be the elimination of racial identification of schools. The racial identity of Southern schools, however, is maintained in a variety of ways.[175] One is the continued segregation of teaching staff. In Houston, for example, only six of the city's more than 200 schools had any desegregation of their full-time staffs in 1965. This involved only 17 out of some 9,500 teachers in the city.[176] In Louisville, 84 percent of the Negro teachers taught at schools more than 90 percent Negro.[177] In Atlanta, only four of the 59 schools 90 percent or more Negro had any white teachers by 1965.[178] In Baltimore, 85 percent of the Negro staff were in schools more than 90 percent Negro in 1965. The story is the same in many other cities.[179]

Kirkwood School." The court found, in discussing the use of proximity as a criterion for transfers that this was perfectly proper: "Another illustration [of shifting population] is Kirkwood Elementary School above referred to where, although it was not covered at the time by the Atlanta plan, the large influx of Negroes into the community was solved by voluntary application of many white students for transfers to Wesley and Whiteford Schools, making room for Negroes in close proximity to Kirkwood. No discrimination was practiced in this regard." *Id.* at 625.

[175] In Houston, for example, the Research Department still arranges its files according to "white" and "colored" schools. (Observed in staff visit to Houston public schools, Aug. 1966.) In the fall of 1964, reports of the results of achievement test scores were sent to junior high school principals. The reports sent to Negro schools were labeled results of "Colored Junior High Schools." Averages were given by "City (White); City (Colored); Your School." Reports of the same test results sent to white schools were broken down by averages for "City" and "Your School." Negro test score results were not included in the "City" average. Plaintiff's Ex. No. 18, *Broussard* v. *Houston Independent School District, supra* note 162. In Baltimore, the Merganthaler Vocational High School was opened in 1953 for a white student body. (Baltimore City Public Schools, *Directory of the Public Schools of Baltimore, Md.—1953–54,* 77.) At the same time a new Negro vocational high school was planned. (*Southern School News,* September 1954, 7.) In 1954, when the schools were desegregated, Negro children remained in their old school awaiting completion of the new school, and Merganthaler remainder virtually all-white. (Information obtained from Miss Clara Grether, Research Specialist, Bureau of Research, Baltimore City Public Schools; Baltimore City Schools, *Net Roll by Grades and Types as of October 1954—White and Negro—Taken from Child Population Register.*) In 1955, the new Negro school opened. It was named Carver and had an all-Negro student body. (School construction data for 1955, supplied by Bureau of Research, Baltimore City Public Schools.) Both of these schools draw students from all parts of the city. In 1965 they remained segregated. Baltimore City Public School, *Net Roll by Race, Oct. 31, 1965.* See also U.S. Commission on Civil Rights, *Survey of School Desegregation in the Southern and Border States, 1965–66,* 33–35 (1966).

[176] *Broussard* v. *Houston Independent School District,* Defendants Ex. No. 3, *op. cit. supra,* note 162.

[177] Samuel V. Noe, Superintendent of Schools, *Status of Desegregation in the Louisville Public Schools, Sept. 23, 1966* (Oct. 17, 1966), and State Department of Education, *Integration in the Public Schools of Kentucky,* Oct. 1965.

[178] Data received from Atlanta Public Schools.

[179] City of Baltimore, Bureau of Research, Department of Education, *Faculty By Race, September 30, 1965.* In Raleigh, N.C., staff segregation on the elementary level remained complete in 1965, so that all but 54 Negro elementary children attended all-Negro schools with all-Negro staffs. (Source: Raleigh Public School

Footnote continued on following page.

The availability of transportation to a school outside one's neighborhood also limits the exercise of choice. In some cases transportation is available only on a basis which will promote, not reduce, segregation. In Houston, for example, bus routes devised to serve the dual school system were not revised when the dual system was abolished officially.[180] Consequently, in 1965, children received transporation only as it was routed to schools under the dual attendance system. In many instances, buses traced the actual boundaries of the abolished dual areas.[181] The vehicles traveled long distances to carry Negro children past white schools to Negro schools, and while children past Negro schools to white schools. White children living in the Piney Point area, served by a Negro school, received transportation to the all-white Pilgrim school.[182] Since the buses were not routed to carry Negro children to white schools, many Negro children could not choose to attend white schools for lack of transportation.[183]

The exercise of free choice also is limited by school authorities' determinations of what constitutes overcrowding. If different standards are applied to majority-white and majority-Negro schools, they can maintain or intensify segregation.

The Board of Education in Baltimore provided that when a school was in danger of becoming overcrowded, its usual open enrollment program could be discontinued and the school "districted," permitting the attend-

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System.) In Richmond, Va., all but two Negro elementary teachers remained at all-Negro schools in 1965. Twenty-four white elementary teachers taught at four schools 90 percent or more Negro. Ninety-five percent of the Negro elementary children in 1965 attended Negro schools with virtually all-Negro staffs. (Source: Richmond Public School System.) In Wilmington, Del., where pupil and staff desegregation was more advanced in 1965, 40 percent of the Negro elementary children remained at nearly all-Negro schools with virtually all-Negro staffs. Seventy-six percent of the Negro elementary staff remained at schools 90 percent or more Negro. (Source: Wilmington Public School System.) See also *App. A,* Table 1, for extent of staff desegregation in Southern and border cities.

[180] *Broussard* v. *Houston Independent School District,* Record, Vol. III, pp. 590, 609, 611, *supra,* note 162. The director of school transportation testified that the bus routes used during the 1965–66 school year were the same as those used when the system had been segregated. He stated that practices would be revised for the 1966–67 school year so that Negro children, riding a "Negro bus" that passed a white school, could alight at the white school if they wished. If the demand were sufficient, buses would also carry children from Negro areas to white schools. However, demand had to be made known by the middle of August. It seems unlikely that the demand could be known by the middle of August, since the choice period was not until the end of August. Furthermore, the system did not publicize the revised transportation policies, making it likely that many Negro children would not choose a white school, thinking there was no possible way to get there. See Houston Independent School District, "Letter to Parents on Registration," Aug. 5, 1966.

[181] Houston Independent School District, *Report on Geographical Sources for School Bus Transportation, Pupils Eligible and Ineligible,* (Dec. 16, 1965) and official school board map of elementary boundaries, 1964–65.

[182] *Ibid.*

[183] Staff interviews with Mrs. Gertrude Barnstone and Mrs. Charles White, board members, Houston Independent School District, Prof. William McCord, Department of Sociology, Rice University, and Rev. and Mrs. William Lawson, August 1966.

ance only of those children residing within the geographical district lines.[184] But different standards of overcrowding were used for white and Negro schools. White schools were districted when equally crowded Negro schools were not. Some Negro schools were put on double shift.[185] One of the criteria used by administrators for determining when a school was threatened with overcrowding was when the area surrounding the school was "in the process of changing from a white to a Negro residential area." [186] The arrangement of these district lines sometimes had the effect of maintaining racial separation in racially mixed areas. An example was Baltimore's Elementary School 242, which was all-white in 1954. That year the boundary lines were extended to include the white children living in an area that was becoming predominantly Negro. As a result, School 242 was nearly 50 percent over capacity. A nearby Negro school opened the same year well under capacity.[187]

Only limited school desegregation has been achieved under free choice plans in Southern and border city school systems. A combination of factors has operated to retard school desegregation under these plans. Some factors, such as the use of racial criteria in honoring student preferences, the maintenance of school staff segregation, and the perpetuation of dual boundaries through bus transportation routes, can be readily identified as interfering with the exercise of free choice and impeding progress in school desegregation. Other factors, including deeply entrenched patterns of dual attendance in Southern and border city schools, cannot be assessed so easily. Nonetheless, the degree of school segregation in these free-choice systems remains high. In some instances racial isolation is greater than it would be under a strict system of geographical zoning. In Atlanta, for example, the nearest high school for many elementary students attending Bolton (100 percent white), Chattahoochee (100 percent white), and Mount Vernon (92 percent white) is Archer High School (100 percent Negro). Under strict geographical zoning these three elementary schools normally would feed into Archer High School. Under Atlanta's free choice system, however, students graduating from

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[184] Baltimore Public Schools, *Desegregation Policies and Procedures, 1954–63,* May 22, 1963, at 2–3, 10–11.

[185] The average percentage enrollment of capacity for nearly all-Negro elementary schools in 1954 was 138.6 percent, whereas for nearly all-white schools it was 123.1 percent. Yet, only one-fifth of the Negro schools were districted compared to one-third of the white schools. Computed from capacity and enrollment figures given in City of Baltimore, Bureau of Research, Department of Education, *Physical and Administrative Details of School Buildings,* 1954.

[186] Baltimore Public Schools, *op. cit. supra* note 184, at 10, 11.

[187] *Id.* at 88; see map of Baltimore, Md., for location of schools; for school capacity and enrollment figures, see Baltimore Department of Education, *supra* note 185. Memorandum to the School Plant Planning Committee from the Bureau of Research, Oct. 24, 1956, Subject: Northwood Elementary School No. 242 Population Pressure and the Yorkwood School No. 219. In 1959 a new school, No. 209, was constructed one-half block west of the district line for School No. 242. Although the school was located in an integrated area, it opened 90 percent Negro.

these elementary schools attend O'Keefe High School (97 percent white).[188]

In Houston, too, some schools—Katherine Smith and Piney Point, for example—would have been less segregated had neutral attendance zones been drawn. But under Houston's free choice plan Smith School was all-white and Piney Point School was all-Negro in 1965.[189] Thus even in cities with high degrees of residential segregation, free-choice plans sometimes have produced more rigid school segregation than under a system of school attendance based entirely on residence.

* * *

In Southern and border cities, then, school segregation results from a number of factors. First, zoning plans—even if free from gerrymandering—may result in school segregation merely because of rigid residential segregation. Second, carryovers from the dual school system, such as transportation and segregated teaching staffs, still persist. In addition, school segregation in Southern and border cities has been furthered by decisions on site selection, school size, grade structure, transfer priorities, and standards of overcrowding.

Summary

The causes of racial isolation in city schools are complex and the isolation is self-perpetuating. In the Nation's metropolitan areas, it rests upon the social, economic, and racial separation between central cities and suburbs. In large part this is a consequence of the discriminatory practices of the housing industry and of State and local governments. The Federal Government also shares in this responsibility. Federal housing policy, for many years openly discriminatory and attuned largely to the suburban housing needs of white, affluent Americans, has contributed substantially to this separation. Even now, the Federal Government's policy on equal housing opportunity and its programs aimed at providing housing for low-income families are inadequate to reverse the trend toward racial isolation in metropolitan areas.

The separation between city and suburban populations has been reinforced by increasing disparities in wealth. At a time when the financial

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[188] *Atlanta Study,* at 125 (proximity), 132 (feeder pattern). Telephone interview with John W. Haldeman, Administrative Assistant, Office of Superintendent, Nov. 4, 1966 (racial composition 1966–67).

[189] *Broussard* v. *Houston Independent School District, supra* note 162, Plaintiff's Ex. No. 2, and Defendant's Ex. No. 3. Houston Independent School District, *Report on Geographic Services for School Bus Transportation, Pupils, Eligible and Ineligible, Dec. 16, 1965.* White children were bused from near the all-Negro Piney Point School to the white Pilgrim School some distance away. Negro children were bused from near the all-white Smith School to the all-Negro Highland Heights School some distance away. Because these children live so close to schools serving the other race, were a neutral boundary to be drawn, some desegregation would occur.

burdens of central cities and the demands for social services have been growing, cities have been losing fiscal capacity. Cities which formerly surpassed suburbs in educational expenditures are now falling behind. State education aid fails to equalize the growing disparity between suburban and central city public schools and recently enacted Federal aid programs are insufficient to reverse the trend. This disparity adds further impetus to the existing movement of affluent white families to the suburbs. In many metropolitan areas, racial concentrations in the central city schools have reached the point where solutions are no longer even theoretically possible within the city alone.

The pattern of residential segregation is reflected within the central city as well. Here, too, the private housing industry, and government at all levels, share much of the responsibility for creating and perpetuating residential segregation. Geographical zoning is the common method of determining school attendance and the neighborhood school is the predominant attendance unit. When these are imposed upon the existing pattern of residential segregation, racial isolation in city schools is the inevitable result. In addition, the day-to-day operating decisions of school officials—the location of new school facilities, transfer policies, methods of relieving overcrowded schools, determination of the boundary lines of attendance areas—often have further intensified racial isolation. In the North, where school segregation was not generally compelled by law, these policies and practices have helped to increase racial separation. In the South, where until the *Brown* decision in 1954 school segregation was required by law, similar policies and practices have contributed to its perpetuation.

La Schools cases

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23345

UNITED STATES OF AMERICA and LINDA STOUT,
by her father and next friend, BLEVIN STOUT,

Appellants,

versus

JEFFERSON COUNTY BOARD OF EDUCATION,
ET AL,

Appellees.

No. 23331

UNITED STATES OF AMERICA,

Appellant,

versus

THE BOARD OF EDUCATION OF THE CITY OF
FAIRFIELD, ET AL,

Appellees.

No. 23335

UNITED STATES OF AMERICA,

Appellant,

versus

THE BOARD OF EDUCATION OF THE CITY OF
BESSEMER, ET AL,

Appellees.

Appeals from the United States District Court
for the Northern District of Alabama.

No. 23274

UNITED STATES OF AMERICA,

Appellant,

versus

CADDO PARISH SCHOOL BOARD, ET AL,

Appellees.

No. 23365

UNITED STATES OF AMERICA,

Appellant,

versus

THE BOSSIER PARISH SCHOOL BOARD, ET AL,

Appellees.

No. 23173

MARGARET M. JOHNSON, ET AL,

Appellants,

versus

JACKSON PARISH SCHOOL BOARD, ET AL,

Appellees.

No. 23192

YVORNIA DECAROL BANKS, ET AL,

Appellants,

versus

CLAIBORNE PARISH SCHOOL BOARD, ET AL,

Appellees.

Appeals from the United States District Court
for the Western District of Louisiana.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The undersigned, counsel for the North Carolina State Board of Education, respectfully move this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

Respectfully submitted,

North Carolina State Board of Education

T. W. Bruton
Attorney General

Ralph Moody
Deputy Attorney General

State of North Carolina

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BRIEF OF AMICUS CURIAE

Various school districts in the State of North Carolina -- together with the State Board of Education -- are presently involved in proceedings with the Department of Health, Education, and Welfare relating to their eligibility for Federal financial assistance in light of the provisions of Title VI of the Civil Rights Act of 1964 and the March 1966 Revised HEW Guidelines issued thereunder. For this reason, the North Carolina State Board of Education files this amicus curiae brief to request this Court to limit its en banc consideration of the instant cases to the precise constitutional issues before it, and not to engage in the type of extensive and manifestly gratuitous discussion contained in the original two-judge majority opinion on such subjects as the proper scope and meaning of various provisions of Title VI or the validity and significance of the implementing Guidelines.

The instant cases present questions relating to the constitutional requirements for a valid "freedom of choice" school desegregation plan. Nothing else is at issue and nothing else need be decided.

Title VI of the Civil Rights Act of 1964 deals with "Nondiscrimination in Federally Assisted Programs." So far as here pertinent,

it directs every Federal agency that extends financial assistance to any State program or activity to adopt rules, regulations, or orders designed to enforce the statutory requirement of nondiscrimination in the administration of such program or activity. The March 1966 Guidelines were promulgated by HEW as a "Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964." Their stated purpose is simply to make public the standards HEW has decided to apply in determining whether a particular school district is entitled to continuing Federal financial assistance under Title VI.

Since there is no question in any of the cases now before this Court regarding the eligibility of a school district or school board for Federal financial assistance, there is no reason whatever for this Court to construe the provisions of Title VI or to otherwise consider in the abstract the scope and validity of the Guidelines under Title VI. As was stated by Judge Larson in a virtually identical setting:

> "[W]e are not here concerned with regulating the flow of Federal funds." (Kemp v. Beasley, 352 F.2d 14, 23 (8th Cir. 1965).)

Where, as here, the issues presented are the constitutional requirements for a valid "freedom of choice" school desegregation plan, questions relating to the scope and construction of Title VI and the implementing Guidelines are simply not pertinent. Only where Federal financial assistance is at issue are Title VI and the Guidelines directly

involved, and only in such a case would it be appropriate for a court to pass upon the multitude of difficult and complex questions of statutory construction that would then arise.[1/]

It may well be that certain provisions of the Guidelines are entitled to be given some weight by the courts in determining whether a particular school desegregation plan meets constitutional standards. To the extent certain provisions of the Guidelines are accorded any such weight, however, it can only be because they are found by the court to represent a proper restatement of existing constitutional law.[2/] Yet it seems clear beyond question that endorsing certain provisions of the Guidelines as minimum constitutional standards should not, and in

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1/ For example, in administering Title VI HEW is expressly prohibited from taking action with respect to "any employment practice of any employer," except in certain cases not here pertinent. (Sec. 604, Title VI.) This prohibition may well invalidate the Guideline requirements for the desegregation of faculty and staff as a prerequisite to receiving Federal financial assistance. But whether it does invalidate those requirements is not involved in the instant cases, and need not even be considered by this Court in order to resolve the issues here before it.

If the Guidelines were involved, necessarily the question would arise as to whether, in whole or in part, they constitute "rules, regulations, or orders of general applicability" requiring the approval of the President. (Sec. 602, Title VI.) Since such approval has admittedly never been obtained, specific provisions of the Guidelines might well be invalid and unenforceable even in a Title VI proceeding. Again, however, such a question is not now before this Court.

2/ Of course, under any view the Guidelines contain detailed rules which go far beyond a restatement of existing constitutional standards. Under no circumstances would there be occasion here for this Court to issue a blanket endorsement of each and every detailed provision in the Guidelines, many of which may be appropriate in one factual setting but not in another.

fact cannot, be construed as an endorsement of their scope and validity in cases arising under Title VI. Indeed, Judge Wisdom himself seemed to acknowledge the existence of this crucial distinction at one point in the course of his opinion in the instant cases, when he stated:

> "Congress recognized that HEW's requirements for qualifying for financial assistance are one thing and the courts' constitutional and judicial responsibilities are something else again." (Slip Op., p. 93.)

Should this Court en banc fail to recognize the clear distinction between Title VI questions and constitutional questions and refuse to limit the scope of its opinion to the constitutional issues here involved, the impact of its actions will be felt by countless school districts throughout the country presently engaged in Title VI proceedings. The search for uniformity should not cause this Court to abandon all fetters of sound judicial restraint by choosing to decide matters not in any way before it, particularly where such action could be so plainly prejudicial to so many school districts not a party to this litigation.

Since these cases do not in any way involve eligibility for Federal financial assistance, there is no reason whatever for this Court to consider any of the legal questions arising under Title VI or the implementing Guidelines. The North Carolina State Board of Education, therefore, respectfully requests that the Court's en banc opinion in the instant cases be limited to the constitutional issues

presented and that any decision as to the validity or effect of Title VI or the Guidelines be reserved for a case in which those issues are squarely presented.

Respectfully submitted,

North Carolina State Board of Education

T. W. Bruton
Attorney General

Ralph Moody
Deputy Attorney General

State of North Carolina

March 1, 1967

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Motion for Leave to File Brief as Amicus Curiae and Brief of Amicus Curiae have been served upon each of the following persons by first class mail, this 1st day of March, 1967:

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Birmingham, Alabama

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New York, New York

William H. Baker
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Exchange Security Bank Building
Birmingham, Alabama 35203

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Maurice F. Bishop
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1821 Orleans Avenue
New Orleans, Louisiana

Ralph Moody
Deputy Attorney General

State of North Carolina

WAGner, Victor - case, correspondence
1963-1967

Society of Wisconsin

Please Retain Original Order

Box 44
Folder 2

Suite 1030
150 Nassau Street
New York, N.Y. 10038
964-8288

February 16, 1967

Mr Joseph McIntee
Box 705
Towner, North Dakota

Dear Mr. McIntee:

At the request of my client Mr. Victor Wagner, I wonder if you could advise me concerning a possible partition of property, last in the name of V.H. Wagner who died in 1963.

The property was located in the northeast corner of McHenry County in the community know as Willow City. Mr. Wagner at the present time is owner with three sisters. He would like to know what the possibility is of partition of this property and an estimate of your fee and the legal costs of the same.

At this time I do not know whether any others would be willing to join with Mr. Wagner in this proceeding, I do know however, that at least one of the other three will probably oppose such a procedure to the extent that opposition is possible.

Thank you for your courtesy in this matter.

Very truly yours,

Carl Rachlin

CR:n

LAW OFFICES OF
Joseph C. McIntee
ATTORNEY AT LAW
Towner, North Dakota 58788

OFFICE DIAL 537-6735
RESIDENCE 537-6801

THOMAS L. BURGUM
ASSOCIATE

February 22, 1967

Mr. Carl Rachlin
Attorney at Law
Suite 1030
150 Nassau Street
New York, New York 10038

Dear Mr. Rachlin:

RE: Your file: Mr. Victor Wagner

I am in receipt of your letter dated February 16, 1967, in regard to a possible partition suit by your client, Mr. Victor Wagner on real estate owned by himself and his three sisters.

Our law specifically provides for a procedure for the partition of real property. Under this procedure, the District Court upon the proper pleadings and evidence, will order the property divided according to the respective rights to the persons interested therein and if they cannot agree or if a partition cannot be made without great prejudice to the owners, then the court can order a sale of the property or any part thereof.

Our law further provides that all persons interested in the property, including any tenants who may be on the property must be named as parties defendant and I assume that some of the persons interested in the property other than Mr. Victor Wagner are residents of states other than North Dakota and if so, it will be necessary to publish the Summons in accordance with the statutes made and provided. It would, of course, be to your clients best interest, if the parties could agree to a partition of the property. In other words, if they agree, it would be divided in four specific parts with each of the parties thereto receiving a deed to his or her respective share. If this is not agreeable, of course, the court will then so order it or order the entire parcel or any part thereof for sale.

Before giving you an accurate estimate of the fees and costs involved, I must have an Abstract of Title continued to a recent date, the names and addresses of all parties concerned, including any tenants and those who would be joining as parties plaintiff and those who would be joined as parties defendant. I would also like to know whether or not your client whom I would assume would be one of the plaintiffs, would agree to an Order of Sale should the same be necessary.

Again I say it is rather difficult to estimate the fees and costs in such an action but it would be my opinion at this time that the minimum fee would be $500.00 plus costs which is the recomended minimum fee schedule in such type of actions.

I might add, that I have had several of these actions and they are rather lengthy affairs.

Therefore, if you could give me further information such as that mentioned herein, I would be in a better position to give you a more accurate estimate of the fees and costs.

Thank you very kindly for your inquiry and I shall await your reply.

Sincerely yours,

McINTEE AND BURGUM

BY: Joseph C. McIntee
Joseph C. McIntee
ieb

JCMc:blk

[June 27, 1963]

THIS AGREEMENT, made by and between HERTA WAGNER, hereinafter referred to as the Wife, and VICTOR H. WAGNER, hereinafter referred to as the Husband, Witnesseth:-

WHEREAS, the parties hereto were married to each other on March 19th, 1940, and

WHEREAS, there have been two issue of the marriage, namely, Edrie Wagner, born August 26, 1941, who is over 21 years of age, and Irene Wagner, born October 10, 1943, who is 19 years of age, and

WHEREAS, in consequence of unhappy differences the parties have separated and are now and for some time past have been living separate and apart, and since their separation have agreed to live separate and apart during their natural lives, and

WHEREAS, the parties are desirous of settling and adjusting their property rights and obligations, and the husband is desirous of making provisions for the support and maintenace of the wife and of the infant issue;

NOW, therefore, in consideration of the reciprocal and mutual promises and undertakings herein contained, and the payments to be made by the husband as provided herein, and for other good and valuable considerations, the parties agree:

1. The parties hereto may and shall at all times live and continue to live separate and apart. Each shall be free from interference, authority and control, marital or otherwise, direct or indirect, by the other, as fully as if he or she were sole and unmarried. Each may reside at such place as he or she may select. Each may, for his or her separate and individual use and benefit, engage in, conduct, carry on or be employed in any business, profession or employment, and each shall retain the emoluments and benefits thereof solely to his or her own separate use.

2. The parties hereto shall not molest, trouble or annoy each other; however, any proper communication between the parties as to the enforcement of the provisions of this agreement, or the prosecution of any action for divorce by one party against the other, shall not be deemed a breach of this provision. Neither party hereto shall compel or attempt to compel the other to cohabit or dwell with him or her, by any means whatsoever.

3. The husband shall make the following payments to the wife for her support and maintenance:

(a) the husband shall pay to the wife the basic sum of $2800 per year, by making payments to the wife by check or money order mailed to the wife at her residence address or such other address as she shall designate in writing, in the amount of $233.33 once a month, in advance, on the first day of each month or as soon after the first day of each month as shall be practicable, not to exceed ten days; the husband shall have the right to make such payments semi-monthly or weekly, in advance, in proportionate amounts; such payments shall commence on the date of the execution of this agreement by both parties.

(b) the sum of $2800 per annum is based upon the husband's present gross income from earnings; and here and hereafter in this agreement when referring to the income of the husband from earnings, it is agreed that such term shall be that sum which is to include all earnings from all sources

by personal services rendered by the husband, and as normally reported in the U. S. Individual Income Tax Return, form 1040, items 1 and 6 of such income reported, or by any comparable items in future forms.

(c) it is further agreed that if the husband's present income from earnings as defined above shall increase in any calendar year, then and in such event the husband shall pay to the wife, in addition to the payment provided in subdivision (a) above, the following amount: of any amount so received by the husband in income from earnings as so defined, over the sum of $11,800, the husband shall pay to the wife 28% thereof in the same manner as provided in Subdivision (a) of this paragraph; the purpose and meaning of this provision immediately set forth above is as follows: the husband in the year 1962 derived the sum of $10,391.66 from earnings; out of any increase in income from earnings over and above said $10,391.66 and up to said $11,800.00, namely an increase of $1408.34, there shall be no increase of payment to the wife on such $1408.34; of any increase in income from earnings over and above the total of $10,391.66 and $1408.34, namely, $11,800.00, such additional percentage of 28% shall be paid to the wife. It is further agreed that this escalator clause shall descend from any increase so specified above, and shall reascend and redescend from time to time thereafter as shall occur changes in the husband's income from earnings; and the wife's portion of payments shall reascend and redescend accordingly; it is further agreed, however, that there shall be a minimum payment to the wife of not over 28% of the husband's net earnings under any circumstances, even if such earnings are less than $9600 per annum. In addition to the items specified in paragraph (b) above as defining the husband's income from earnings, it shall be deemed that the husband's income from earnings for the purpose of computing the wife's payments therefrom shall include the net amount of any grants to the husband for teaching or similar purposes, after deducting therefrom any and all reasonable and necessary expenses to the husband in carrying out the terms of such grant, whether or not such grant is taxable.

(d) on or before the 10th day of February of each year, commencing with the year 1964, the husband shall submit to the wife a statement made by him under oath, certifying to the amount of his income from earnings as above defined, from all sources, including but not limited to said grants, for the previous calendar year. With this statement, the husband shall make payments to the wife, if any, of any increase due to the wife as computed by the above provisions by which such share shall exceed the payments actually made; and such increase shall be paid by adding one-twelfth of such unpaid additional share to each of the monthly payments to be made to the wife in the ensuing year directly following the year in which the husband received such increase in earnings. If the statement sets forth that the share to the wife as computed by the above provisions is less than the payments theretofore actuslly made by the husband, the husband shall deduct one-twelfth of such overpayment from each of the monthly payments made to the wife in said following year.

(e) It is agreed that if the wife shall remarry or die, then and in either of these events all support and maintenance for the wife, and any other benefits herein provided for the wife, including but not limited to insurance carried for the benefit of the wife, shall cease and be extinguished.

(f) It is agreed that the obligations of the husband with respect to the amounts payable by him hereunder for the support andmaintenance of the wife, shall cease with his death, except for any arrearages in such payments, and any increase due under subdivisions(c) and (d) of this paragraph, which shall be payable in a lump sum outof his estate upon accounting or distribution thereof.

(g) It is agreed that the terms and conditions of this agreement shall become effective and operate as of January 1, 1963; and the parties acknowledge that each has from January 1, 1963 to the date of execution of this agreement performed all the conditions of thepart of each to be performed.

4. The husband agrees that he will solely and individually out of his own assets and income, support, maintain and pay for the education of Irene Wagner, until she becomes twenty-one years of age orolder in his discretion, or marries, whichever event shall occur sooner and the determination of such amounts for all of such purposes shall be solely within the discretion of the husband. During such time as such support, maintenance and education are provided by the husband, he may claim said Irene Wagner as a dependent on income tax returns for the purpose of tax deduction thereby, and the wife shall not claim said Irene Wagner as her dependent.

5. It shall be deemed that the custody and control of Irene Wagner is mutually held by both of the parties hereto, until she is twenty-one years of age or married, whichever event shall occur sonner. All visits to either of the parties, and all questions of where the said Irene Wagner shall reside, shall be the sole decision of Irene Wagner and within her sole and individual choice and discretion. The parties hereto will endeavor to share fairly, and with due regard to sentiment and affection towards such issue, Christmas, New Years Day, Easter, birthdays, and summer vacation periods. Each party shall encourage Irene Wagner to honor and respect both parents, and neither party shall attempt to alienate or destroy or affect the affection of Irene Wagner for the other party, either by oral or written communication or deed.

6. The parties hereto do make the following provisions with regard to the division or disposition of their real and personal property:

(a) the real property owned by the parties hereto as tenants by the entirety at 21 Minetta Court, Huntington, shall be disposed of as follows: The husband shall forthwith deliver to the wife a bargain and sale form ofdeed, transferring said property from the husband and wife to the wife individually, without consideration except as hereinafter expressed; The consideration for such property shall be $12,000.00, which shall be distributed as follows: the present mortgage held by County Trust Company of Tarrytown, N.Y., shall be paid and satisfied in full; the present FHA loan through the Matinecock Bank of Locust Valley, N. Y. and forming a lien on said property shall be paid and satisfied in full; the sum of $5000. shall be paid to the husband's Father in full payment of any and all sums loaned or advanced by him for the purchase of said real estate or in connection with such real estate; the balance of the said sum of $12,000 shall be divided equally between the husband and wife; any escrow on deposit with the mortgagee or mortgagees shall be used in reduction of such mortgage or mortgages.

All adjustments beteen husband and wife shall be made as of the date of delivery of deed from husband to wife; the husband shall pay his attorney for the handling of his interest in the transaction; and the wife shall out of her own funds pay her attorney for the handling of her interest in the transaction. The execution and delivery of the deed from the husband to the wife is made upon the condition that the wife shall expeditiously apply for a mortgage in the sum of not less than $10,000; and shall obtain such mortgage; and upon the husband delivering to the attorney for the wife a deed executed by husband and wife to the wife, the attorney for the wife shall hold such deed in escrow until the wife shall execute and deliver a deed to said property, from the wife to the husband and wife; and the deed from husband and wife shall then be released from escrow and delivered to the wife for effectuating of such mortgage loan; and the deed from the wife to the husband and wife shall be held by the attorney for the wife in escrow; and written acknowledgement of suchshall be made by the wife's attorney to the husband; and if the wife does not obtain such mortgage loan of at least $10,000 within a reasonable time, the attorney for the wife shall deliver the deed from the wife to the husband and wife, to the husband, and he may record and register the same in the County Clerk's Office; and it shall be deemed that then and thereafter the property shall be owned by the husband and wife as tenants in the entirety, any prior deed or instrument to the contrary notwithstanding.

(b) of the bank accounts individually or jointly maintained heretofore by the parties, the wife shall retain the savings account in her individual name, and the checking account in her individual name, and same shall be owned and possessed solely by her. The husband shall retain the checking account and the savings account in his individual name, and the deposit in the checking account in their joint names, and the same shall be owned and possessed solely by him.

(c) of the investments individually or jointly owned by the parties hereto, the wife shall retain the Mutual Fund stock in both names, and the 5 shares of Korvette stock in both names, and same shall be owned and possessed solely by her; and the husband shall sign any assignment necessary to effect such purpose. The wife shall in addition retain the Mutual Fund investment in the name of Herta Wagner In Trust For Irene Wagner, and same shall be owned and possessed solely by her.

(d) the wife shall retain possession and sole use of the 1958 Ford automobile formerly registered in the name of the hsuband, and same shall be owned solely by her; and the husband, having paid the insurance thereon for 1963, shall not demand repayment thereof by the wife.

(e) any automobile heretofore, now or hereafter purchased by the husband, shall be owned and possessed solely by him.

(f) the savings bonds in the husband's name shall be retained by him, and owned and possessed solely by him.

(g) each party will retain all personal articles, toilet articles, jewelry, clothing and personal effects heretofore possessed by him or her, and same shall be owned and possessed solely by such party retaining same.

(h) the wife shall retain the refrigerator; piano and all other musical instruments and musical appurtenances;

couch; all silver and china; washing machine; and same shall be owned and possessed solely by her; and the parties hereto have divided equitably and to their satisfaction the remainder of the furniture, fixtures, phonograph records, and each party shall possess and own those articles selected in such division by him or her.

7. With reference to insurance, the following provisions are hereby agreed upon:

(a) the husband shall continue his wife and Irene and Edrie as the beneficiaries on any Blue Cross, Blue Shield or any other medical or hospital insurance which he now carries; except that if the parties hereto are divorced and any such medical or hospital insurance company or group or association shall then refuse to carry the ex-wife as a beneficiary, the husband shall be no longer obligated to carry such insurance for the wife.

(b) the husband shall continue to carry the wife as beneficiary and Irene and Edrie as successor beneficiaries on the following policies; #22592221, New York Life Insurance Co., $2500 on the life of the husband; #17669185, New York Life Insurance Co., $500 on the life of the husband; #791434, Bankers Life Insurance Co., $1000 on the life of the husband; #1336140, Bankers Life Insurance Co., $1000 on the life of the husband; said policies shall be delivered by the husband to William E. Tweedy, Esq., attorney, with offices at Fort Salonga Road, Fort Salonga, N.Y., as escrow holder, on an escrow agreement signed by said William E. Tweedy and delivered to the respective parties hereto, that he will hold such policies in escrow for the benefit of the parties hereto, and that he will not surrender same with the exceptions hereinafter noted, and that the husband will not borrow on, pledge or create any lien on any of said policies, and that the husband may not change the beneficary or successor beneficiaries on any of such policies without the written consent of the wife, except that if the wife dies or remarries, or if either of the successor beneficiaries dies, then and in such events or any of them the husband may make proper change of beneficiary or successor beneficary; that the husband may not cash in such policies or surrender same for cancellation; and that the escrow holder will forthwith notify the wife in the event of a notice of non-payment of premium on any of such policies as well as notify the husband; and on default of the husband in paying such premium, the wife may pay same before such policy shall lapse for non-payment, and the husband shall be obligated to repay the wife for such payment forthwith; and in the event that the husband predeceases the wife and the wife shall not have remarried, the escrow holder will surrender such policies to the wife for payment of the principal sum to her. William E. Tweedy may designate any successor escrow holder to succeed him in such escrow agreement, in his discretion, upon such designated successor escrow holder making a similar written agreement with the parties hereto; and in the event of the said William E. Tweedy predeceasing the parties hereto or being unable for any reason to act as such escrow holder, or being unwilling to act as such escrow holder and not obtaining a successor escrow holder within a reasonable time, in any of such events the parties hereto shall mutually designate a person as successor escrow holder upon similar terms and conditions.

(c) The husband may continue to hold the following policies, and have the right to change the beneficiary thereon to any person he may so desire, or otherwise dispose of such policies in his sole discretion: #20104829, New York Life Insurance Co., $2500 on the life of the husband;

#20686204, New York Life Insurance Co., $1000 on the life of the husband.

(d) The wife may continue to hold policy number 17668328, New York Life Insurance Co., $500 on the life of the wife, and may change the beneficiary thereon to any person she may so desire, or otherwise dispose of such policy in her sole discretion.

(e) it is further agreed that the husband shall continue liable for the premiums on the policies in paragraphs (b) and (c) above, and the wife on the policy in paragraph (d).

8. Simultaneously with the execution of this agreement, the husband and wife shall each execute, and shall thereafter keep in effect, a will or wills wherein at least one-third of his or her estate, as hereafter defined, shall be given, devised and bequeathed to Edrie and Irene Wagner, in equal shares; or if one of them shall predecease such maker, to the issue of such deceased daughter; or if such deceased daughter should die without leaving issue, then to the surviving daughter or her surviving issue; however, if both daughters should predecease the maker leaving no issue surviving the maker, then this provision shall have no effect and be cancelled and void. It is hereby agreed by the parties that the word "estate" as above prescribed, shall mean the gross estate of each party passing under his or her respective will, less funeral and burial expenses, administrative expenses, debts (but only to the extent paid from assets included in the gross estate,) and estate and income taxes. This agreement on the part of each of the parties hereto to make such provision in his or her will in favor of the issue of their marriage, is based upon the consideration of the other party making an identical reciprocal promise, and it is the intention of each of the parties hereto that there will be at his or her death a will in which the aforesaid provision will be inserted in accordance with this agreement; and it is expressly agreed by each of the parties hereto that in the event that either party hereto dies intestate or leaves a will contrary to or repugnant to the provisions of this paragraph, then and in any of such events the provisions of this agreement shall prevail and shall be binding upon each of the parties' estates, their heirs and legal representatives.

9. It is agreed that the counsel fees for the respective parties for all services in negotiations leading up to, the preparation and drawing of this agreement, and its execution and delivery, shall be paid by the husband.

10. The wife accepts the provisions herein made for her in lieu of and in full settlement, accord and satisfaction of any and all claims and rights against the husband for a property settlement, and for her support and maintenance, and in full settlement, accord and satisfaction of any and all other claims, debts, demands, dower rights or other interest or rights whatsoever, which she ever had, now has, or might hereafter acquire against the husband by reason of their relationship as husband and wife, or otherwise, excepting only such rights and obligations as are specifically provided in this agreement. The wife warrants to the husband that she has not heretofore incurred any obligations whatsoever, for which the husband or his estate might be or become liable, and the wife agrees to indemnify and hold the husband safe and harmless therefrom. So long as the husband shall duly perform all the terms and conditions of this agreement on his part to be performed, the wife shall not at any time hereafter

incur any debt or obligation either on behalf of herself or Irene for which the husband or his estate might be or become liable, and the wife agrees to indemnify and hold the husband safe and harmless therefrom.

11. Each party hereto shall, at the reasonable request of the other party, execute and deliver to the other party, any and all instruments and assurances that the other party may reasonably require for the purpose of giving full force and effect to the provisions of this agreement.

12. Each party hereby releaseses and relinquishes any and all claims and rights such party may have had, may now have, or may hereafter acquire, (a) to share in the estate of the other party upon the latter's death by way of statutory allowance, distribution in intestacy, or election to take against the other party's last will and testament, under section 18 of the Decedent Estate Law of the State of New York, or any comparable law or statue elsewhere; and (b) to act as administrator of the other party's estate. It is the intention of the parties that this provision shall serve as a mutual and reciprocal waiver of the right of election, in accordance with the requirements of subdivision 9 of Section 18 of the Decedent Estate Law of the State of New York, or a any comparable law or statute elsewhere.

13. No modification or waiver of any of the provisions of this agreement shall be valid unless in writing and signed by both of the parties hereto. No waiver of any breach, violation of provision or default hereunder shall de deemed a waiver of any subsequent breach, violation or default of the same or similar nature.

14. The provisions of this agreement shall not be construed to prevent either party from suing the other party for an absolute divorce in this or any other competent jurisdiction, upon any grounds that such party may elect. This agreement shall be incorporated in any such judgment or decree of divorce, either by insertion, or by referral by description and date of this agreement, as binding upon the party suing and upon the party being sued, but shall not be merged in such a judgment or decreee of divorce; neither party shall, in any such action for a divorce, seek, obtain or accept any order, judgment or decree providing any property settlement, alimony, support, counsel fee, custody of infant issue, or any other provisions, other than those provided in this agreement. It is agreed that this agreement shall be absolute and binding upon the parties hereto forever, and shall subsist and survive the granting, signing, entry, issuance and effectiveness of any order pendente lite, or order, or any judgment or decree of divorce, any provisions of any such order pendente lite, order, judgment or decree to the contrary notwithstanding, and this agreement shall forever remain prevailing and conclusive upon the parties hereto.

15. Each of the parties hereto individually declares that the and she has had independent legal advice by a counsellor at law of the individual choice of each; and each has fully read this agreement and fully understands the agreement and all of its provisions; that each has been informed of all legal rights and obligations; and that after such understanding and advice and information, each believes the agreement to be fair, just, equitable and reasonable; and that each executes the same freely and voluntarily.

16. This agreement shall be construed and governed by the laws of the State of New York; and shall be binding upon the estates of each of the parties hereto, and their heirs, executors and administrators.

17. The husband represents and warrants that he has heretofore paid all the income taxes, federal and state, on all joint returns heretofore filed by the parties, and that no tax deficiency proceeding is pending against the parties. The husband agrees, if there should be a tax deficiency assessment in connection with the joint returns, he will pay the amount ultimately determined to be due thereon, and further agrees to indemnify and hold the wife safe and harmless therefrom. This provision shall not operate with respect to any undisclosed income of the wife for which there might be an additional deficiency. The wife agrees that any refund on the aforesaid joint income tax returns shall belong to the husband.

18. Any material breach of any provision of this agreement by either party, may be deemed by the other party as a breach of such provision, or in the alternative as a breach of the entire agreement; and the injured party may and shall have the right to sue for damages, or for specific performance, or to deem the entire agreement breached and rescind the entire agreement, and maintain any marital or other action at law or in equity for such relief as may be available to such injured party.

19. Each party hereto shall at all times keep the other party informed, in writing, of his or her place of residence and place of business; and shall promptly notify the other party of any change, giving the proper address of any new place of residence or place of business.

20. It is further agreed that in the event that the husband shall retire and cease gainful employ, then and in such event this agreement shall be revised accordingly, and equitably to both of the parties hereto.

21. This agreement shall be executed in quadruplicate, each of which copies so executed shall be deemed an original.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals, the 27 day of June 1963.

Herta Wagner .....LS
(Herta Wagner)

Victor H. Wagner .....LS
(Victor H. Wagner)

STATE OF NEW YORK, COUNTY OF SUFFOLK, SS.:

On this 27th day of June 1963, before me personally appeared HERTA WAGNER, to me known, and known to me to be one of the individuals who executed the foregoing instrument, and she duly acknowledged to me that she executed the same.

Eileen E. Martilla
(Notary Public)

EILEEN E. MARTILLA
Notary Public, State of New York
Qualified in Suffolk County
No. 52-2554200
Commission Expires March 30, 1965

STATE OF NEW YORK, COUNTY OF SUFFOLK, SS.:

On this 27 day of June 1963, before me personally appeared VICTOR H. WAGNER, to me known, and known to me to be one of the individuals who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

William E. Tweedy
(Notary Public)

WILLIAM E. TWEEDY
Notary Public, State of New York
No. 52-4044275 Suffolk County
Term Expires March 30, 1965

~~WILLIAM E. TWEEDY~~
~~Notary Public, State of New York~~
~~No. 52-4044275 Suffolk County~~
~~Term Expires March 30, 19~~

~~WILLIAM E. TWEEDY~~
~~Notary Public, State of New York~~
~~No. 52-4044275 Suffolk County~~
~~Term Expires March 30, 19~~

WECHSLER, STUART, NORMAN VS. DORCHESTER, SOUTH CAROLINA 1965

Box 4
Folder 3

Society of Wisconsin

Please Retain Original Order

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

IN THE MAGISTRATES COURT

DEC 17 1965

THE STATE

Respondent

-vs-

NOTICE OF MOTION

Stuart Norman Wechsler

Defendant

TO THE HONORABLE H. H. WALTERS, MAGISTRATE, IN THE COUNTY OF DORCHESTER STATE OF SOUTH CAROLINA:

PLEASE TAKE NOTICE, that the above named defendant will move before this Court at 4:30 P. M. or as soon thereafter, as Counsel can be heard, for a New Trial, said Motion being attached hereto.

Ernest A. Finney, Jr.
Ruben L. Gray
Attorneys for Defendant

By Ernest A. Finney, Jr.
Ernest A. Finney, Jr.

December 13, 1965

Due and legal notice and service of the foregoing Notice of Motion is acknowledged and a copy retained this 13th day of December, 1965.

H. H. Walters

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

IN THE MAGISTRATES COURT

THE STATE

Respondent

-vs-

MOTION FOR NEW TRIAL

Stuart Norman Wechsler

Defendant

TO THE HONORABLE H. H. WALTERS, MAGISTRATE, IN THE COUNTY OF DORCHESTER STATE OF SOUTH CAROLINA:

PLEASE TAKE NOTICE, comes now the defendant of the above named and respectfully moves this Honorable Court for a New Trial on the grounds that at the time of the original Trial the defendant was not advised by the Court that he had a right to a Jury Trial.

Ernest A. Finney, Jr.
Ruben L. Gray
Attorneys for Defendant

By Ernest A. Finney, Jr.
Ernest A. Finney, Jr.

December 13, 1965
Sumter, South Carolina

Due and legal notice and service of the foregoing Motion For New Trial is acknowledged and a copy retained this day of December, 1965.

H. H. Walters

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

IN THE MAGISTRATES COURT

THE STATE

Respondent

vs.

Stuart Norman Wechsler

Defendant

NOTICE OF INTENTION TO APPEAL AND EXCEPTIONS

TO THE HONORABLE H. H. WALTERS, MAGISTRATE, IN THE COUNTY OF DORCHESTER STATE OF SOUTH CAROLINA:

PLEASE TAKE NOTICE, that the above named defendant intends to, and does hereby appeal to the Court of General Sessions for Dorchester County from the rulings, finding of guilty, and sentence issued by the Court in the above entitled case upon the following grounds, to wit:

1. That the Court erred in that at no time during the proceedings was the defendant advised of his right to a Trial by Jury, in violation of the defendant rights as protected by the Constitution of the United States Amendments 6 and 14, and the Constitution of South Carolina, Articles 1, Section 18.

Ernest A. Finney, Jr.
Ruben L. Gray
Attorneys for Defendant

Ernest A. Finney, Jr.

December 13, 1965

Due and legal notice of the foregoing Notice of Intention to Appeal and Exceptions is acknowledged and a copy retained this day of December, 1965.

H. H. Walters

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

IN THE MAGISTRATES COURT

DEC 17 1965

THE STATE

Respondent

vs.

NOTICE OF INTENTION TO APPEAL AND EXCEPTIONS

JEROME WILLIAMS, GEORGE H. ELMORE

JOSEPH GREEN, JENNETTE GRIFFIN

JEANETTE RHETT, SHIRLEY BRITT

HORACE BROWN, GLORIA FELDER

ANNIE SIMMONS, BENNIE RHETT

WILLIE H. FRAZIER, JOSEPH CLAYTON

JAMES POOSER, ~~JOHN H. MARTIN~~ Roger Tracy

ARTHUR CALWAY, JERRY WALKER

Appellants

TO THE HONORABLE H. H. WALTERS, MAGISTRATE, IN THE COUNTY OF DORCHESTER STATE OF SOUTH CAROLINA:

PLEASE TAKE NOTICE, that the above named defendants intend to, and do hereby appeal to the Court of General Sessions for Dorchester County from the rulings, finding of guilty, and sentence issued by the Court in the above entitled cases upon the following grounds, to wit:

1. The Court erred in overruling the defendants motion for a continuance made on the ground that Counsel did not have an adequate opportunity to prepare a defense, specifically, the legislative history of Section 16-551, Code of Laws of South Carolina, 1962, under which the defendants were charged.

2. The Court erred in overruling the defendants motion to quash the warrants made on the grounds that the warrants and the statute under which the warrants were brought is vague, indefinite, and uncertain in that it did not inform the defendants sufficiently of the charges to which they were required to meet, as required by the Constitution of the United States, specifically, the 1st, 4th, and 14th Amendments, and the Constitution of South Carolina, specifically, Article,1, Sections 4, 5, and/or 18.

3. The Court erred in overruling the defendants motion to quash the warrants made on the grounds that the warrants are unlawful in that the facts alleged in the warrants constitute an infringement upon the rights of these defendants as granted and protected to them by the Constitution of the United States, specifically, the 1st and 14th Amendments and the Constitution of South Carolina, specifically, Article 1, Sections 4 and 5.

4. The Court erred in overruling the defendants motion to quash the warrants made on the grounds that the warrants are unlawful ab initio in that the facts alleged in the warrants constitute an infringement upon the rights of these defendants as granted and protected to them by the Constitution of the United States, specifically, the 1st and 14th Amendments and the Constitution of South Carolina, specifically, Article 1, Sections 4 and 5.

5. The Court erred in overruling the defendants motion to quash the warrants made on the grounds that the alleged acts committed by the defendants did not show a violation of Section 16-551, Code of Laws of South Carolina, 1962.

6. The Court erred in overruling the defendants motion to dismiss, for a directed verdict, new trial, and judgment notwithstanding the verdict made on the grounds that the warrants were vague, indefinite, and uncertain in that they did not inform the defendants sufficiently of the charges which they were required to meet, as required by the Constitution of the United States, specifically, the 1st, 4th, and 14th Amendments, and the Constitution of South Carolina, specifically, Article 1, Sections 4, 5, and/or 18.

7. The Court erred in overruling the defendants objection to testimony by Mr. Bstson, Superintendent of public schools School District No. 2 of Dorchester County, to the conclusion that these defendants were disturbing the school.

8. The Court erred in overruling the defendants objection to testimony by the Sheriff of Dorchester County to the effect that these defendants were interfering with the operation of the school.

9. The Court erred in overruling the defendants objection to testimony by Mr. Robinson, Principal of Williams Memorial School of St. George, County of Dorchester, to the conclusion that these defendants were disturbing the school.

10. The court erred in limiting Counsel for the defendants in examination of Mr. Robinson, Principal of Williams Memorial School, and Mr. Bastson, Superintendent, or the school officials of Dorchester County, on the question of greviances which these defendants and their parents had against Mr. Robinson and/or Mr. Bastson.

11. The Court erred in overruling the defendants motion for dismissal of the charges made on the ground that the State failed by required proof to establish a corpus delecti in that the evidence presented by the State did not establish that these defendants violated Section 16-551, Code of Laws of South Carolina, 1962.

12. The Court erred in overruling the defendants motion for dismissal, directed verdict, new trial, and for judgment notwithstanding the verdict, made on the grounds that the State failed to establish a prima facie case, in that there was no evidence in the record that the acts complained in the warrants were a violation of Section 16-551, and further, that these acts were not protected by the 1st and 14th Amendments to the United States Constitution and Article 1, Sections 4, 5, and 18 of the Constitution of South Carolina.

13. The Court erred in overruling the defendants motion for dismissal, for directed verdict, new trial, and judgment notwithstanding the verdict made on the grounds that the facts alleged and the facts presented by the testimony were insufficient to prove, beyond a reasonable doubt, the elements necessary to convict under Section 16-551, Code of Laws of South Carolina, 1962.

14. The Court erred in overruling the defendants motion for dismissal, for directed verdict, new trial, and judgment notwithstanding the verdict made on the ground that the State had shown at the time the accuseds committed the alleged violation, they were exercising rights protected to them by the Constitution of the United States, specifically, the 1st and 14th Amendments and rights protected to them by the Constitution of South Carolina, specifically, Article 1, Sections 4, 5, and/or 18.

Ernest A. Finney, Jr.
Ruben L. Gray
Attorneys for Defendants
Appellants

By: Ernest A. Finney, Jr.
Ernest A. Finney, Jr.

Due and legal notice and service of the foregoing Notice of Intention to Appeal and Exceptions is acknowledged and a copy retained this day of December, 1965.

_____
Magistrate

December 13, 1965

LAW OFFICES
FINNEY AND GRAY
16½ WEST LIBERTY STREET
SUMTER, S. C. 29151

ERNEST A. FINNEY, JR.
RUBEN L. GRAY

P. O. BOX 836
TELE. 775-1787

DEC 17 1965

December 14, 1965

Mr. Carl Rachlin
Valdeck & Elias
Attorneys at Law
280 Broadway
New York 7, New York

Dear Carl:

I forgot to enclose in my last letter to you a copy of the Notice of Motion of Removal, I am enclosing that herein. I am also enclosing herein a copy of the Notice of Intention to Appeal and Exceptions in the matter of the sixteen students who were convicted in St. George.

As to the matter involving Stuart Wechsler, I am enclosing a copy of the Motion For New Trial, and Notice of Intention to Appeal and Exceptions. These were taken to St. George yesterday afternoon at 4 o'clock and delivered to the Magistrate. He refused to accept service stating that the time for filing had expired 12 o'clock noon. Under our statutory provisions I believe he is technically correct. It would be my recommendation that we not proceed any further in this matter.

I am now in the process of making the necessary arrangements to secure appointments before a Federal Judge on the removal proceedings and Habeas Corpus proceedings for Davidman and Lee as soon as I have a firm date and time I will call you. I anticipate hearing before Friday. While in St. George I talked with both Davidman and Lee and seemingly they are both in good spirit.

Yours very truly,

Ernest

Ernest A. Finney, Jr.

JVL

Enclosures

cc: Marvin Rich

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ERNEST A. FINNEY, JR.
RUBEN L. GRAY

P. O. BOX 836
TELE. 775-1787

December 14, 1965

To: Mr. Carl Rachlin

From: Finney & Gray Attorneys Subject: Fees and Expenses

1. One trip to St. George to serve signatures of verified petition. 134 miles at .10 per mile. $13.40.

2. One trip to Orangeburg, Service of Solicitor 108 miles at .10 per mile. $10.80.

3. One trip to Columbia, to file copies of Removal Action with the Clerk of Court of the U. S. District Court. 88 miles at .10 per mile. $8.80.

4. One trip to St. George, for purpose of filing Motions, Davidman case, perfecting bond in the case of sixteen students and file Notice of Wechsler's case. 134 miles at .10 a mile. $13.40.

5. One trip to St. George, to secure statements from David and Lee. 134 miles at .10 per mile. $13.40.

6. Telephone calls in connection with these matters $25.60.

7. Attorneys fees, two lawyers working five days at $100.00 per day, $500.00.

8. Consultation fee, Attorney Matthew J. Perry $100.00.

Total of Fees and Expenses ----------$685.40.

Respectfully Submitted,

Ernest A. Finney, Jr.

Ernest A. Finney, Jr.

P. S. We have previously sent a bill in connection with the school children we are now being pressed for payment. We would appreciate very much if you would try to get this out on Thursday of this week.

cc: Marvin Rich

...DFRE

WECHSLER, STUART, et. al. vs. COUNTY OF GADSDEN, 1965

Box 44
Folder 4

...of Wisconsin

Please Retain Original Order

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ASSIGNMENT OF ERRORS

No. 1 The Court erred in failing to retain jurisdiction upon the allegations set forth in the removal petitions

No. 2 The Court erred in failing to hold a hearing to determine the facts upon which the allegations of the removal petitions were based

No. 3 The Court erred in remanding the appellants removed cases without a hearing

No. 4 The Court erred in concluding that the interest of justice would be better served by remanding the appellants cases

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STATEMENT

On August 14th, 1964 the appellants in both cases filed a Petition for Removal of Criminal proceedings against them by the County of Gadsden. On August 17th, 1964 the prosecuting attorney of the Juvenile Court and the Justice of the Peace Court for Gadsden County were notified that the appellants' cases had been removed to the United States District Court for the Northern District of Florida.

When the Justice of the Peace Court purported to exercise jurisdiction and convicted three of the appellants, even though he acknowledged that the petition for removal had been filed, the appellants McVoy and Wechsler applied to the United States District Court for the Northern District of Florida for a writ of habeas corpus which was issued. At the hearing on the petition for a writ of habeas corpus, the Court, Carswell, J., sua sponte, remanded not only the cases of Wechsler and McVoy, but also of all of the appellants herein.

The Order of Remand was made without any hearing as to whether the allegations of the removed petition were true and without notice to the petitioners that there would be such a hearing.

The appellants herein filed timely notices of appeal and have obtained a stay of proceedings the Juvenile Court and the Justice of the Peace Court for Gadsden County pending the outcome of these appeals.

ARGUMENT

I.

The appealability of remand orders

Section 901 of the Civil Rights Act of 1964 has made

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orders of remand of cases removed pursuant to 28 U.S.C., Section 1443 appealable. The petition for removal of the order of remand and this appeal have been filed since the effective date of Section 901.

II.

The petition for removal contains sufficient allegations to vest jurisdiction in the U. S. District Court.

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The original removal statute, Revised Statute 641, was first enacted as one of the provisions of the Civil Rights Bill of 1866, 14 Stat. at L. 27, Chap. 31, Sect. 1. It was at the center of the overall Congressional "design to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it." Strauder v. West Virginia, 100 U. S. 303. In 1866 the Congress viewed the Civil Rights Removal Statute as an essential ingredient in a program of full enforcement of the sweeping guarantees of liberty and equality enunciated in the Fourteenth Amendment. Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648; Strauder v. West Virginia, supra.

The fundamental thrust of the War Amendments was the elimination of discrimination in the enforcement of the law. Section 641 itself, the predecessor of 1443, was designed to guarantee that "the law in the States shall be the same for the black as for the white," Strauder v. West Virginia, supra. And as the Court said further in Strauder, the words of the Fourteenth Amendment contain "a necessary implication of a positive immunity, or right, most valuable to the colored race ... the right to exemption from legal discrimination implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." Strauder v. West Virginia, supra.

From the first of the landmark decisions interpreting the scope of the guarantees of liberty enacted in the War Amendments to the most recent, compare The Slaughterhouse Cases, supra. (1873) and Monroe v. Pape, 365 U. S. 175 (1961), the prohibition against unequal treatment in the protection of a

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legal right has always been in the center of any discussion of the equal protection and due process clauses. Limitations upon the ability of the Negro to protect legal rights guaranteed under the Constitution was the classic hallmark of a system of servitude and one of the principal "badges and indicia" of slavery.

Accordingly, the Congress believed it essential for the federal courts to be free to preserve the vitality and efficacy of those statutes designed by Congress to implement and enforce the fundamental guarantees of freedom and equality set forth in the Thirteenth, Fourteenth and Fifteenth Amendments. Congress thus felt keenly the necessity of providing a forum free from the control and influence of local and state white power groups in which federal rights under attack in such state proceedings could be fairly and effectively protected. This was the significance of the removal provisions enacted originally inthe Civil Rights Bill of 1866 and presently embodied in 28 U.S.C. 1443. See Strauder v. West Virginia, supra.

III.

1. The facts set forth in the petitions reveal a clear case for removal under subsection (1).

The peitions for removal fully meet the requirements for federal jurisdiction under subsection (1) of 28 U.S.C. 1443. This subsection provides:

> "Any of the following civil actions or criminal prosecutions, commenced in a State court, may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof: . . ."

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It is alleged in the removal petition that the petitioners were seeking to disseminate information concerning the rights of negroes to register and vote in federal elections. These were objects of serious public importance. These appellants were utilizing their rights of free speech and expression in these cases. The removal petition set forth facts which clearly demonstrated that the petitioners would be unable to enforce their equal rights to a fair trial in either the Juvenile Court for the Justice of the Peace Court for Gadsden County. No evidence was introduced which would indicate otherwise. No finding of facts was made at the time of the Order of Remand in either case which would controvert the allegations of the removal of the petitions.

The only issue before this court is whether the state proceedings were properly removed in August of 1964. This is not a discretionary question. It does not call for "equitable" considerations. While a court of equity may possibly mold a decree, even on appeal, to meet changed conditions, a federal court may decide questions of jurisdiction only upon factual circumstances as they existed at the time of invocation of the federal jurisdiction. There are compelling reasons underlying this requirement. Otherwise the removal jurisdiction conferred upon the district courts under Section 1443 could be constantly thwarted by long delays normally incident upon appelas and the subsequent argument on appeal. But this would totally frustrate the Congressional purpose in providing an impartial, effective and immediate judicial forum for the vindication of fundamental federal rights. Constitutional rights to be meaningful as we have been told must be "warrants for the here and now." Watson v. City of Memphis, 373 U. S. 526. This is the reason for the providing of a federal forum to protect the present exercise of these rights. To excuse

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the refusal of the district judge to exercise the jurisdiction Congress required him to exercise would be to negate wholly the Congressional intention. It is elementary federal law that litigants have a right to invoke federal jurisdiction and the denial of this right without a hearing would violate due process of law. Reynolds v. Cochran, 365 U. S. 525; Council of Federated Organizations v. Rainey #21795. CA 5, Dec. 28, 1964.

The removal petitions reveal a uniquely compelling set of facts requiring the conclusion that in August of 1964 a fair trial could not be had in either the Juvenile Court or the Justice of the Peace Court for Gadsden County. Removal jurisdiction under Section 1443 subdivision (1) was clearly established. This jurisdiction cannot be wiped out "in interest of justice and in the judicial administration." (Order of Remand)

IV.

It is likely that appellees will rely upon language in certain Supreme Court opinions in order to argue that a case may be removed under subsection (1) only when equal rights are denied by a state statute or constitution. See Virginia v. Rives, 100 U. S. 313; Gibson v. Mississippi, 162 U. S. 565; Kentucky v. Powers, 201 U. S. 1. If such cases were to be read as establishing an inflexible rule restricting removal under 1443 (1) solely to situations involving a State statute or constitution it may well be that the last case analyzing the scope of the statute, Kentucky v. Powers, supra, decided over fifty years ago must be approached in the spirit of the new vitality brought to the Fourteenth Amendment by the recent decisions of the Court. Compare Plessy v. Ferguson, ~~supra~~, 163 U.S. 537, with Brown v. Board of Education, ~~supra~~, 347 U.S. 483. Many commentators have urged that the restrictive case law gloss of Rives and Powers no longer is persuasive in limiting the original scope

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and purpose of the Civil Rights ~~m~~ Removal Statute. See Note, 19 St. John's Law Rev. 43, 47; 54 Harv. L. Rev. 685.

But legislative history of 1443 (1) would indicate that the original Congressional intention was not to limit civil rights removal only to cases in which a State statute or constitution was involved. Thus Section 3 of the Act of 1866, the legislative predecessor of 1443, allowed removal for denial of or inability to enforce "in the courts or judicial tribunals of the State <u>or locality where they may be any of the rights secured to them by the first section of this act</u> . . ." (emphasis added). ① Two conclusions follow. First, the language referring to inability to enforce rights in the "locality" of a State suggests that local prejudice in addition to a statute would be a ground for removal. Second, the rights "secured to them by the first section" of the Act of 1866 included at that time, and still includes (42 U.S.C. 1981) the right "to the full and equal benefit of all laws <u>and proceedings for the security of person</u> and property, as is enjoyed by white citizens," (emphasis added), and the right to "be subject to like punishment, pains, and penalties, and to none other."

In short, the original statute guaranteed not only equal <u>laws,</u> but equal "<u>proceedings</u>" as well; indeed, the rights secured by section 1 of the Act of 1866 (now 42 U.S.C. 1981) extend all the way to the sentencing stage, protecting Negroes

---

① The "locality" provision was rephrased in Rev. Stat. § 641, which turned removal on the inability to enforce federal rights "in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending." This wording was carried forward in §31 of the JudicialCCode of 1911, 36 Stat. 1087, 1096, and appeared in 28 U.S.C. §74 (1940). In the 1948 revision it was "omitted as unnecessary," Revisor's Note, presumably on the theory that one who may remove from a state court may thereby remove from the court of any part of the state. The omission tokens no substantive change in the statute.

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from unequal punishments.

The legislative history of the Act of 1866 lends additional support to the view that it was not only statutory denials of equal rights that were grounds for removal. Thus, Sentator Trumbull, the manager of the Civil Rights Bill which became 14 Stat. 27, said on the floor (Cong. Globe, 39th Cong., 1st Sess., p. 1759):

> "If it be necessary in order to protect the freedman in his rights that he should have authority to go into the federal courts in all cases where a custom prevails in a State, discriminating against him, I think we have the authority to confer that jurisdiction under the second clause of the (Thirteenth) Amendment . . . ." (emplasis added).

In Senator Trumbull's view, then, removals were not limited to situations where a state statute discriminated against Negroes, but extended to other situations as well.*(2)

And Senator Wilson, defending the bill, was apparently of the same view. He declared that under the Bill freedmen"". . . shall live under the same laws, be tried for their violation in the same manner, and if found guilty punished in the same manner and degree"(emphasis added). Cong. Globe, 39th Cong., 1st Sess., p. 603. Again, his statement indicates that the bill protected not only against unequal laws but against unfair discriminating judicial proceedings, whatever the laws of the State might declare on their face.*(3)

---

(2)* Indeed, the Sentator expressly said that it was not the existence of a statute, any more than that of a custom, that constituted such a failure of state process as to authorize removal; rather, in each case, whether custom or statute, it was the probability that the state court would fail adequately to enforce federal guarantees. Cong. Globe, 39th Cong., 1st Sess. 1759 (4/4/1866):

> So in reference to this third section, the jurisdiction is given to the Federal courts of a case affecting the person that is discriminated against. Now, he is not necessarily discriminated against, because there may be a custom in the community discriminating against him, nor because a Legislature may have passed a statute discriminating against him; that statute is of no validity if it comes in conflict with a statute of the United States with which it was in direct conflict,,and the case would not therefore rise in which a party was discriminated

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against until it was tested, and then if the discrimination was held valid he would have a right to remove it to a Federal court -- or, if undertaking to enforce his right in a State court he was denied that right, then he could go into the Federal court; but it by no means follows that every person would have a right in the first instance to go to the Federal court because there was on the statute book of the State a law discriminating against him the presumption being that the judge of the court, when he came to act upon the case, would, in obedience to the paramount law of the United States, hold the State statute to be invalid.

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* Since the inception of the government, federal removal jurisdiction has been progressively expanded by Congress to protect national interests in cases "in which the state tribunals cannot be supposed to be impartial and unbiased" (THE FEDERALIST, No. 80 (Hamilton)). Hamilton wrote: "The most discerning cannot foresee how far the prevalency of a local spirit may be found to disquality the local tribunals for the jurisdiction of national causes . . ." (THE FEDERALIST, No. 81, (Hamilton)). In the federal convention Madison pointed out the need for such protection:

Mr. (Madison) observed that unless inferior tribunals were dispersed throughout the Republic with final jurisdiction in many cases, appeals would be multiplied to a most oppressive degree; that besides, an appeal would not in many cases be a remedy. What was to be done after improper Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a new trial at the supreme bar would oblige the parties to bring up their witnesses, tho' ever so distant from the seat of the Court. An effective Judiciary establishment commensurate to the legislative authority, was essential. A Government without a proper Executive & Judiciary would be the mere trunk of a body without arms or legs to act or move. I FARRAND, RECORDS OF THE FEDERAL CONVENTION 124 (1911).

The Judiciary Act of 1789 allowed removal in specified classes of cases where it was particularly thought that local prejudice would impair national concerns (Act of September 24, 1789, § 12, 1 Stat. 73, 79-80), and extensions of the removal jurisdiction were employed in 1815 and 1833 to shield federal customs officials (Act of February 4, 1815, § 8, 3 Stat. 195, 198; Act of March 2, 1833, §3, 4 Stat. 632,633).

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b) However, even the more restrictive language in Virginia v. Rives, supra, and Kentucky v. Powers, supra, support the conclusion that removal was proper under 1443 (1) under the facts set forth in these petitions.

In the line of cases beginning with Virginia v. Rives and ending with Kentucky v. Powers the Court was concerned with the problem that a petitioner seeking removal of a case before trial

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on the ground that he could not obtain a fair trial in the State court would have to swear to the existence of prospective facts. In Rives the Court pointed out that the removal statute required a petitioner to swear to the existence of a state of facts which would bring the statute into play. Thus when the complaint was the inability to obtain a fair trial the allegations might be speculative. The underlying rationale was made clear in Virginia v. Rives, supra at 320:

> "In all such cases (wherein a Negro is denied the equal protection of the laws by statute) a defendant can affirm, on oath, before trial, that he is denied the equal protection of the laws or equality of civil rights. But in the absence of constitutional or legislative impediments he cannot swear before his case comes to trial that this enjoyment of his civil rights is denied to him. When he has only an apprehension that such rights will be withheld from him when his case shall come to trial, he cannot affirm that they are actually denied, or that he cannot enforce them." (emphasis added)

The issue therefore posed by the early cases was to set guideposts which could indicate the degree of certainty required to affirm in a petition that a fair trial in a State court would be in fact denied. See Virginia v. Rives and cases cited supra. Thus among the indicia which the Court felt would show the necessary degree of certainty that a fair trial would be denied were the existence of statutes or constitutional provisions affecting the ability to enforce the right to a fair trial in the State court. See Virginia v. Rives and cases cited supra. The concept underlying these decisions was to attempt to make sure that removal occurred only in the face of a reasonable certainty that equal rights could not be enforced in the State court. Thus an analysis of all of the Supreme Court opinions from Rives through Powers indicates that the rationale underlying the gloss imposed upon subsection (1) is the requirement that the circumstances surrounding an invocation of subsection (1) must indicate a reasonable certainty that a fair trial will in fact be denied to defendants in the pending State court proceedings.

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Otherwise there is no rational explanation for the discussion of the relevance of statutes or constitutional provisions.

~~That~~ All the circumstances surrounding the present petitions indicate beyond a shadow of a doubt the existence of the requisite degree of certainty required to ground removal jurisdiction under subsection (1). The unequal treatment of law enforcement officers based upon their color; the disparaging and contemptuous way in which negro defendants are treated by the courts in Gadsden County; and the exclusion of negroes from juries in Gadsden County establish in as certain a manner as a statute could require that the rights of negroes and negro sympathizers would be denied in said courts. Thus the rationale of Virginia v. Rives would seem to directly support the conclusion that the removals in this case were proper. If "certainty" is the test which the case law gloss places upon subdivision)1) of 1443 the ~~facts~~ ALLEGATIONS in this ~~record~~ CASE bring these petitions squarely within the holdings of Rives and Powers.

The petitions for removal also present a substantial question of the constitutionality of the statute under which all the petitioners have been arrested. And this question would be sufficient to justify the removal under section 1443 subdivision 1. We do not ask this court at this time to rule on the constitutionality of the statute since this should have been the function of the district court when the proceedings were removed to its jurisdiction. The assertion was made by petitioners that the statute was unconstitutional both on its face and as applied. And this allegation would sustain removal even under a restrictive interpretation of ~~the~~ Rives ~~case~~ and ~~the~~ Powers ~~case.~~ The District Court for the Northern District of Florida should have retained jurisdiction to determine the question of the constitutionality of the statute.

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The absence of findings of fact by the District Court requires reversal of the orders of remand. There was no finding of fact nor indeed was any hearing held upon which the court could base any conclusion that the allegations in the petitions for removal did not justify the assumption of jurisdiction under section 1443 subdivision 1. It would seem that the basic requirements of due process would compel the district court to hold a hearing so that the petitioners might present evidence in support of their allegations, even though respondents neither denied nor attempted to produce evidence to controvert the allegations of the petitions. REYNOLDS v. COCHRAN, SUPRA

B. Removal was Proper Under Subsection (2) of 28 U.S.C. 1443.

1. The facts reveal a clear case for removal under subsection (2).

The petitions for removal meet the requirements for federal jurisdiction under subsection (2) of 28 U.S.C. 1443. This subsection provides:

> "Any of the following civil actions or criminal prosecutions commenced in a state court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> * * * * *
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

The "law" from which appellants' authority to "act" was derived is the Constitution of the United States and in particular the First and Fourteenth Amendments. The Constitution is a "law" of the land within the meaning of the federal statutes. Standard Computing Scale Co. v. Farrell, 249 U. S. 571, 577 (1919); In re Neagle, 135 U. S. 1 (1889); Williams v. Bruffy,

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96 U. S. 176, 183 (1877); Stoffil v. W. J. McCahan Sugar Ref. Co., 35 F. 2d. 602, 630 (E.D. Pa. 1929). The Constitution is thus a law providing for "equal rights" within the meaning of Section 1443 (2). Moreover, appellants acted under color of the numerous federal statutes such as 18 U. S. C. 241, 242; 28 U.S.C. 1343; 42 U.S.C. 1985, 1986, 1987, 1988.

The plain words of Section 1443 (2) merely require a showing of a "color" of authority derived from a law providing for equal rights. It does not require either a showing of express authority or the absolute proof of such authority. If citizens colorably act under such authority this is sufficient within the meaning of the statute. See Whittington v. Johnson, 201 F. 2d 810 (CA 5). It isclear that the gravamen of the acts of the appellants was the exercise of First Amendment rights to free speech. As long as the acts were undertaken "under color of authority derived from the Constitution the prosecutions are removable to the federal court under Section 1443 (2).

The County had the burden of showing that the acts for which the appellants were arrested were not performed under color of authority of laws providing for equal rights. The only relevant question is whether the acts undertaken and for which the appellants are being prosecuted were undertaken under "color" of constitutional or statutory authority. Once this is established the statute is clear, the prosecution may be removed. The actual question of whether the acts are protected or may be punished is only then placed in issue in the subsequent trials. The jurisdictional issue is solely the presence of colorable authority.

There appear to be only two decided cases dealing directly with Section 1443 (2), Hodgson v. Millward, 12 Fed. Cases No. 6, 568, 3 Grant Cases 418 (C.C.Pa. 1863), approved in Braun v. Sauerwein, 10 Wall, 218, 224 (1869). This case concretely

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illustrates the meaning of "color of authority". A federal officer had entered Millward's land under color of a Presidential order. Though there were doubts that the order was formally correct and whether the President would properly issue it, nevertheless removal was allowed. The validity of the order, the court held, "constitutes the very question to be tried and determined (in the federal court). The order was color of authority, whether the substance (of authority) existed or not."

In Arkansas v. Howard, 218 F. Supp. (E.D. Ark. 1963), removal was sought of prosecutions for assault with intent to kill and for carrying a knife, charges arising out of a fight between defendant and a white student after rocks were thrown at the station wagon in which defendant was escorting home from school two Negro students (one, defendant's niece) who had that day been enrolled in a previously segregated school under federal court order. Defendant invoked Sec. 1443 (2) on the theory that in escorting the children and protecting himself and them from persons who sought to frustrate enrollment, he was acting under color of authority derived from the Civil Rights Act of 1960, under which the enrollment order was made. The court assumed, arguendo, that in some circumstances removal under Sec. 1443 (2) was available to a private individual charged with an offense arising out of his escorting pupils to a school in process of desegregation under federal court order, but held that this defendant, in his knife fight with the white student, was not implementing the court's integration order since that order made no provision for transporting or escorting the children to school, in light of the previously peaceful history of the school controversy, by virtue of which, prior to the day of enrollment, there was no reason to anticipate violence; hence there was no "proximate connection,"

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218 F. Supp. at 634, between the court's order and defendant's fight.

Similarly, here the question as to whether the acts of appellants were in fact protected against prosecution by the Constitution or by Civil Rights statutes "constitutes the very question to be tried and determined" in the federal court. Sufficient to ground removal is the fact that the acts of appellants were patently carried out under "color" of the First and Fourteenth Amendments and/or of the Civil Rights Acts whether the "substance" of these rights "existed or not."

Any other interpretation of Section 1443 (2) would render it a nullity. Congress has granted the federal courts jurisdiction in these situations precisely so that these issues, exclusively federal constitutional and statutory questions, may be litigated and decided if desired in the most appropriate forum, a Federal District Court. Thus, it is sufficient for purposes of removal to show that appellants were claiming or acting under color of constitutional or federal statutory rights. (~~The problems of balancing First Amendment rights against asserted interests of community peace and welfare are not before a Deitrict Court on a motion to remand.~~) The problem of whether or not the exercise of constitutional rights will be protected, whether appellants' exercise ~~the~~ of First Amendment rights falls within the orbit of constitutional protection, cf. American Communications Association v. Douds, 339 U.S. 382, must be decided later. To sustain removal it needs merely to be shown that appellants were, in fact, attempting to exercise constitutionally sanctioned rights.

On its face, the authorization of removal by a defendant prosecuted for "any act under color of authority derived from any law providing for equal rights" might mean to reach (A) only federal officers enforcing the Civil Rights Acts, (B) federal

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officers enforcing the Civil Rights Acts and also private persons authorized by the officers to assist them in its enforcement,* (4) or (C) all persons exercising rights granted by Civil Rights Act. The legislative history and context clearly support this third construction which would authorize removal of prosecutions against demonstrators, sit-ins, pickets, etc.

Prior to the enactment of 28 U.S.C. Sec. 1442 (a) (1) (1958), there was no statutory provision generally authorizing removal of cases against federal officers. From early in the nineteenth century, Congress had enacted specific, narrow statutes allowing removal by designated kinds of officers only. In 1815, in the face of New England's resistance to the War of 1812, it provided in a customs ~~act for removal of suits or prosecutions "against any collector, naval officer, surveyor, inspector, any any other officer, civil or military, or any other person aiding or assisting, agreeable to the provisions of this act, or under colour thereof, for anything done, or ommitted to be done, as an officer of the customs, or for any thing done by virtue of this act or under colour thereof . . ." Act of February 4, 1815, ch. 31, Sec. 8, 3 Stat. 195, 198; also Act of March 3, 1815, ch. 93, Sec. 6, 3 Stat. 231, 233. In 1833, responding to South Carolina's resistance against the tariff, Congress enacted the Force Act. of March 2, 1833, ch. 57, 4 Stat. 632, whose second section envisioned that private individuals, as well as federal officers, might take or hold property pursuant to the revenue laws; and whose Sec. 3, 4 Stat. 633 allowed removal of any "suit or prosecution . . . against any officer of the United States, or other person, for or an~~

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(4) * Title 28 U.S.C. Sec. 1442 (a) (1) (1958) authorizes removal of civil actions of criminal prosecutions against "Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals . . ."

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act for removal of suits or prosecutions "against any collector, naval officer, surveyor, inspector, or any other officer, civil or military, or any other person aiding or assisting, agreeable to the provisions of this act, or under colour thereof, for anything done, or omitted to be done, as an officer of the customs, or for any thing done by virtue of this act or under colour thereof..." Act of February 4, 1815, ch. 31, Sec. 8, 3 Stat. 195, 198; also Act of March 3, 1815, ch. 93, Sec. 6, 3 Stat. 231, 233. In 1833, responding to South Carolina's resistance against the tariff, Congress enacted the Force Act of March 2, 1833, ch. 57, 4 Stat. 632, whose second section envisioned that private individuals, as well as federal officers, might take or hold property pursuant to the revenue laws; and whose Sec. 3, 4 Stat. 633 allowed removal of any "suit or prosecution ... against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under colour thereof, or for or on account of any right, authority, or title, set up or claimed by such officer, or other person under any such law of the United States ...." The 1833 act was applied to other revenue laws by the Act of March 7, 1864, ch. 20, Sec. 9. 13 Stat. 14, 17, and the Act of June 30, 1864, ch. 173, Sec. 50, 13 Stat. 223, 241. By the Act of July 13, 1866, ch. 184, 14 Stat. 98, Congress (a) generally amended the revenue provisions of the Act of June 30, 1864; (b) in Sec. 67, 14 Stat. 171, authorized removal of any civil or criminal action "against any officer of the United States appointed under or acting by authority of [the Act of June 30, 1864, and amendments thereto] ... or against any person acting under or by authority of any such officer on account of any act done under color of his office, or against any person holding property or estate by title derived from any such officer, concerning such property or estate, and affecting the validity of [the revenue laws] ..."; and (c) in Sec. 68, 14 Stat. 172, repealed the removal provisions (Sec. 50) of the Act of June 30, 1864, and provided for the remand to the state courts of all pending removed cases which were not removable under the new 1866 removal provisions.

In 1863, Congress enacted the first removal provision applicable to other than revenue enforcement cases. The Act of March 3, 1863, ch. 81, 12 Stat. 755, was a Civil War measure. It undertook principally to authorize Presidential suspension of the writ of habeas corpus, and to immunize from civil and criminal liability persons making searches, seizures, arrests and imprisonments under Presidential orders during the existence of the rebellion. Section 5, 12 Stat. 756, allowed removal of all suits or prosecutions "against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress." This was the predecessor of the removal provisions of the Act of April 9, 1866, ch. 31, Sec. 3, 14 Stat. 27, the first Civil Rights Act.[X] (5)

The 1866 statute was reenacted by reference in the civil rights act of 1870 (The Enforcement Act of May 31, 1870, ch. 114, Secs. 16-18, 16 Stat. 140,144), and, with stylistic changes, became Rev. Stat. Sec. 641:

[X] (5) Section 3 thereof reads, in part, as follows:

"Sec. 3. And be it further enacted, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty-three and all acts amendatory thereof."

"Sec. 641. When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided...."

In 1911, in the course of abolishing the old Circuit Courts, Congress technically repealed Rev. Stat. Sec. 641 (Judicial Code of 1911, Sec. 297, 36 Stat. 1087, 1168) but carried its provisions forward without change (except that removal jurisdiction was given the district courts in lieu of the circuit courts) as Sec. 31 of the Judicial Code (Judicial Code of 1911, Sec. 31, 36 Stat. 1087, 1096). Section 31 verbatim became 28 U.S.C. Sec. 74 (1940), and in 1948, with changes in phraseology, [6] it assumed its present form as 28 U.S.C. Sec. 1443 (1958).

This history indicates that, of the three alternative constructions of Sec. 1443(2) suggested above, alternative (A), reading "color of authority" as restricted to federal officers, is untenable. The 1866 Act in terms authorized removal by "any officer ... or other person, for [enumerated wrongs] ... by virtue or under color of authority derived from this act ...," and the language "officer ... or person" was retained in the Revised Statutes and the Judicial Code of 1911. The "officer" and "person" were dropped in the 1948 revision, and, as the Revisor's Note indicates, no substantive change in the section was intended. Clearly, Sec. 1443 (2) reaches "persons" other than "officers."

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[6] Revisor's Note to 28 U.S.C. Sec. 1443 (1958):

"...

"Words 'or in the part of the State where such suit or prosecution is pending' after 'courts of such States,' [sic] were omitted as necessary.

"Changes were made in phraseology."

The history also suggests grounds for rejecting alternative (B), which would restrict that class of "persons" to persons authorized by federal officers to assist in the enforcement of the Civil Rights Acts. The strongest basis for such a restriction of removal is that the 1866 act designates as removable any suit or prosecution of officers or persons "for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof ... " (emphasis added). This language, which on its face might seem directed rather to actions arising from law enforcement activity than to actions arising from exercise of the rights given by the law, is patterned on the identical phraseology of the 1863 habeas corpus act, where the authorization of removal of actions against officers or persons "for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any Act of Congress" was clearly addressed to actions arising from arrests, seizures and injuries inflicted by Union officers and persons acting under them. However, conceding that the 1866 act adopts the basic framework of the act of 1863, it is evident that it adopts it for other and broader purposes. Whereas the 1863 legislation was concerned principally with protecting Union officers in their conduct of wartime activities, and gave no rights or immunities to private individuals, -- later statutes to the "color of authority" of which the 1866 act refers -- the 1866 Civil Rights Act itself, the Freedmen's Bureau Act of March 3, 1965, ch. 90, 13 Stat. 507, and the amendatory Freedmen's Bureau Act of July 16, 1866, ch. 200, 14 Stat. 173 (which was debated by the 1866 Congress as companion legislation to the 1866 Civil Rights Act) -- did grant to private individuals extensive rights and immunities in the assertion of which it was foreseeable that "trespasses or wrongs"

might be charged against them. Section 1 of the 1866 Civil Rights Act, 14 Stat. 27, and Sec. 14 of the amendatory Freedmen's Bureau Act, 14 Stat. 176, for example, gave all citizens the right to acquire and hold real and personal property, and to full and equal benefit of all laws for the security of person and property. In the exercise of self-help to defend their property or resist arrest under discriminatory state legislation, citizens asserting their federally-granted rights would doubtless commit acts for which they might be civilly or criminally charged in the state courts.

~~Arguably~~, Congress by Sec. 3 of the 1866 act meant to authorize removal in such cases, and not merely cases in which the freedmen acted under the authority of a federal officer. The argument is strengthened by the absence of any words of limitation in the allowance of removal of actions against any person for "wrongs done or committed by virtue or under color of authority derived from" the various acts granting civil rights. When Congress wanted in ~~removal statutes~~ to limit "persons" acting "under color of" law or authority to persons assisting or authorized by a federal officer, Congress several times stated this limitation expressly. It did so in the revenue act of 1815 and again in the revenue act of 1866, by which the same Congress which passed the Civil Rights Act of 1866 limited the broader removal provisions of the 1833 and 1864 revenue acts. Comparison of the revenue-act removal provisions with those of the Civil Rights Acts strongly supports the conclusion that the latter are not limited to persons acting under the directions of a federal enforcement officer.

Moreover, this interpretation is the most plausible under the pattern of removal jurisdiction presently in force by virtue of the 1948 Code. Section 1442 authorizes removal suits or prosecutions against any federal officer or person acting under him for any act under color of office. If the separate removal provision of Sec. 1443(2) "For any act under color of authority derived from any law providing for equal rights" is not entirely redundant, it must reach cases of action by private individuals not "acting under" a federal officer in

the assertion of their civil rights. The conclusion of this argument is that Sec. 1443(2) authorizes removal by any person exercising rights granted by "any law providing for equal rights."

To bring himself within Sec. 1443(2), a defendant must show that the act for which he is prosecuted is colorably protected by -- hence, under the analysis of the immediately preceding paragraphs, done "under color of authority derived from" -- "any law providing for equal rights." This latter phrase clearly means the same thing as the lengthier language of Sec. 1443(1): "any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof."

As has already been pointed out, "any law providing for equal rights" includes the Constitution of the United States. Thus appellants, who asserted equal protection, free speech and other due process claims would be entitled to resort to 1443(2).

Moreover, it is beyond cavil that appellants claiming rights under such federal statutes as the Civil Rights Acts may remove their cases from the state courts. 42 U.S.C. 1983, for example, provides that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." This provision, which protects Due Process rights, including the right of free speech, derives from Sec. 1 of the Ku Klux Act of April 20, 1871, ch. 22, 17 Stat. 13, the third Civil Rights Act -- clearly, in its history and purposes, a "law providing for ... equal civil rights." This, on its face, would appear persuasive that a picket's or a demonstrator's free speech claim, bottomed on the First and Fourteenth Amendments and 42 U.S.C. Sec. 1983 (1958) comes within the removal provisions of 28 U.S.C. Sec. 1443.

Under the plain words of 1443 (2) appellants have more than established jurisdiction. The Supreme Court has not limited in any way the clear and unequivocal words of this statute.

The older decisions of the Supreme Court construing Section 1443 relate solely to an interpretation of subsection (1). Thus such cases construing Section 1443 as Strauder v. W. Virginia, supra, Virginia v. Rives, 100 U.S. 313 (1879); Bush v. Kentucky, 107 U.S. 110 (1882); Smith v. Mississippi, 162 U.S. 592 (1896); Murray v. Mississippi, 163 U.S. 101 (1896); Williams v. Mississippi, 170 U.S. 213 (1898); Neal v. Delaware, 103 U.S. 370 (1880); Kentucky v. Powers, 201U.S. 1 (1906), all relate exclusively with subsection (1). They raise solely the problem of the inability to obtain a fair trial. None of these cases involved a petitioner claiming that the acts for which he is prosecuted were done under color of authority of a law providing for equal rights. The petitioners in these cases had allegedly committed criminal acts such as murder or rape and were raising the issue of whether or not they could get a fair trial in the State court. The holdings in these cases in no way involved subsection (2). The issue of whether or not petitioners will be denied the right to a fair trial in the State court is solely a subsection (1) problem. It does not affect subsection (2) at all.

Similarly all recent District Court opinions deal only with the ability to obtain a fair trial question, exclusively a subsection (1) issue. Cf. Texas v. Dorris, 165 F. Supp. 738; Llano del Rio v. Schmidt, 84 F. Supp. 336; Hill v. Pa., 183 F. Supp. 126; Rand v. Arkansas, 191 F. Supp. 20. In the same way North Carolina v. Jackson, 135 F. Supp. 682, is relevant only to an interpretation of subsection (1). As the Court pointed out in the Jackson case, "the sole basis for the removal stated in defendant's petition" was the allegation that defendant was threatened with the deprival of a fair trial in the State court.

The Supreme Court and District Court cases thus relate solely to a consideration as to under what circumstances it can properly be asserted with any certainty that a defendant will be deprived of a

fair trial in a State Court. Cf. Virginia v. Rives. ~~and cases cited in appellants' main brief~~. These considerations are of course utterly irrelevant to any interpretation of subsection (2). This section does not involve any question of the availablility of a fair trial but solely rests upon the character of the acts for which a defendant has been prosecuted. There can be no speculation about this question. Cf. Virginia v. Rives, supra. The jurisdiction of the Federal Court here does not rest, as in a subsection (1) case, upon an estimate of what may happen in the future in a State court, but upon what has already occurred. It is for this reason that the cases interpreting subsection (1) have no relevance to an interpretation of subsection (2). The statute comes before this Court unrestricted by any case law gloss. The plain words govern. The District Court was required to ~~deny the motion to remand~~. RETAIN JURISDICTION.

In summary, the present appeals provide the Court with a classic subsection (2) situation. Congress clearly intended that where persons are being prosecuted for exercising their constitutional rights these persons should be granted the privilege of having their prosecutions litigated in a federal forum. Appellants here are being prosecuted for constitutionally seeking their equal rights. The orders of remand disregard the statute and plain intent of Congress.

CONCLUSION

These appeals present this Court with a most significant opportunity to clarify the law with reference to civil rights removals. No more compelling auguments for the need for a vigorous application of Title 28, United States Code 1443 exist than those set forth in these cases. We urge this Court to give this statute the interpretation its framers so obviously intended it to have.

The order of remand should be reversed and the cases returned to the District Court for appropriate proceedings.

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February 11, 1965

John Lowenthal, Esq.
521 Fifth Avenue
New York, New York

RE: Wechsler Et.Al. vs.
County of Gadsden

Dear Mr. Lowenthal:

Henry Schwarzschild has advised me that Don Collimore will write the brief in the above-styled case. Henry has raised the question as to whose name would appear on the brief and usually we place as many names on the brief as we have available so that someone will always be prepared and available to argue the case before the court. Since you and Mr. Collimore will be proceeding with the appeal whatever you arrange on this point will be satisfactory to me.

I neglected to add when I talked to Henry as to whether in addition to having the record, did Counsel have Amended Rule 24 of the Circuit Court of Appeal of the Fifth Circuit? If not, I will be glad to send him my copy.

Cordially yours,

Howard W. Dixon

HWD/lmh

cc: Henry Schwarzschild, Esq.
Ninth Floor, 156 Fifth Avenue
New York, New York 10010

Carl Rachlin, Esq. - CORE
38 Park Row
New York, New York

Donald Collimore, Jr., Esq.
1293 Post Road
Fairfield, Connecticut

Dear Howard
I have been reading the correspondence with regard to the Wechsler case. Since there is no CORE involved I would very much like to work (GS)

Office
Henry Schwarzschild
Collimore

February 11, 1965

John Lowenthal, Esq.
321 Fifth Avenue
New York, New York

RE: Wechsler Et.Al. vs.
County of Gadsden

Dear Mr. Lowenthal:

Henry Schwarzschild has advised me that Don Collimore will write the brief in the above-styled case. Henry has raised the question as to whose name would appear on the brief and usually we place as many names on the brief as we have available so that someone will always be prepared and available to argue the case before the court. Since you and Mr. Collimore will be proceeding with the appeal whatever you arrange on this point will be satisfactory to me.

I neglected to add when I talked to Henry as to whether in addition to having the record, did Counsel have Amended Rule 24 of the Circuit Court of Appeal of the Fifth Circuit? If not, I will be glad to send him my copy.

Cordially yours,

Howard W. Dixon

HWD/lmk

cc: Henry Schwarzschild, Esq.
Ninth Floor, 156 Fifth Avenue
New York, New York 10010

Carl Rachlin, Esq. - CORE
38 Park Row
New York, New York

Donald Collimore, Jr., Esq.
1362 Post Road
Fairfield, Connecticut

Dear Lowenthal
Thanks for your letter
of the 11th. Yes, I
have a copy of the
Amended Rule 24 of
the Circuit Court
of Appeals
Don Collimore
will be
preparing the
brief in
the case
Sincerely
Howard

N. Fla

February 16, 1965

Howard W. Dixon, Esq.
415 Seybold Building
Miami 32, Florida

Dear Howard:

I have been reading the correspondence with regard to Stu Wechsler. Since he is a CORE worker I would very much like to see the draft and be associated with the case.

I hope to see you soon. There is a good chance I will be in Florida the first days of March.

Sincerely,

Carl Rachlin
General Counsel

CR/jp

cc: John Lowenthal, Esq.
521 Fifth Avenue
New York, N.Y.

Henry Schwarzschild, Esq.
Ninth Floor, 156 Fifth Avenue
New York, N.Y. 10010

Donald Collimore, Jr., Esq.
1293 Post Road
Fairfield, Connecticut

Recd 3/10/65

COLLIMORE, FITZPATRICK & FRAY & DALY
ATTORNEYS AND COUNSELORS AT LAW

DONAL M. COLLIMORE
JOHN T. FITZPATRICK
JOHN P. FRAY
DONAL C. COLLIMORE

1293 POST ROAD
FAIRFIELD, CONNECTICUT
(203) TEL. CLEARWATER 9-7804

March 9, 1965

Howard W. Dixon, Esq.
Seybold Building
Miami, Florida

Dear Howard:

Enclosed please find a rough draft of the brief to be submitted in the appeal of Stuart Wechsler, et als vs. County of Gadsden. Copies have also been sent to Carl Rachlin and John Lowenthal for comments and corrections.

With respect to the historical background of the Remand section, I am using material loaned to me by William M. Kunstler who prepared the brief in the matter of Baines vs. City of Danville in the Fourth Circuit Court, a case which has been argued and which is awaiting decision.

As soon as I have heard from all three recipients of this draft, I will incorporate their suggestions into a final draft to be submitted to an, as yet undecided, printer. I have received word from Henry Schwarzschild that the time for filing a printed brief was extended to April 7th. I have also received the appropriate forms from the Fifth Circuit Court which will permit me to take the Oath of Admission here in Connecticut so as to eliminate any problems in this respect.

Very truly yours,

DONAL C. COLLIMORE

DCC:dbd

Enc.

Arnold Jaim - Maybe - will advise tomorrow - 3/16

Label and file w/ Lolo

cc Greilsheimer
Bill Ellis

Send to Conf. papers list

COPY

4/5 H.S. Will get extension -

March 17, 1965

Arnold L. Fein, Esq.
660 Madison Avenue
New York, N.Y.

Dear Mr. Fein,

It is very good of you to come to our aid. Enclosed is the draft of the brief to be submitted in the appeal of Stuart Wechsler, et al. vs. County of Gadsden, which is to be tried in the Fifth Circuit Court of Appeals.

The time for filing a printed brief has been extended to April 7th, Mr. Collimore would like to incorporate your suggestions into the final draft.

Thank you very much for your help.

Sincerely,

Hannie de Leeuw
Secretary to Carl Rachlin,
General Counsel

Enc./

4/1 CR phoned Fein - TE 2-7979

4/5 Fein phoned - Says it's OK - Will call Collimore directly -
Fein again - spoke to him - Collimore wants to know if it can be printed in NYC -

Lawyers Constitutional Defense Committee, Inc.

Ninth Floor, 156 Fifth Avenue, New York, N. Y. 10010

(212) YU 9-7530

President

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Special Counsel
American Jewish Congress

Vice-Presidents

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National Council of the Churches of Christ

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Boston College Law School

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NAACP Legal Defense and Educational Fund

CLARENCE B. JONES
Counsel to the Rev. Dr. Martin Luther King, Jr.

HOWARD MOORE, JR.
Counsel
Student Non-violent Coordinating Committee

Executive Secretary

HENRY SCHWARZSCHILD

Mississippi Field Office

603 North Farish Street
Jackson, Mississippi 39202
(601) 948-4191

ALVIN J. BRONSTEIN
Staff Counsel

April 5, 1965

Mr. Edward W. Wadsworth, Clerk
United States Court of Appeals
Fifth Circuit
Rm. 408
400 Royal Street
New Orleans, La. 70130

Re: 21835 - Stuart Wechsler et al v. County of Gadsden, Fla.

Dear Mr. Wadsworth:

May we please have an additional ten days in which to file the appellant's brief in the above case.

Sincerely yours,

Melvin L. Wulf

MLW:lrl
cc: Mr. John Lowenthal
Mr. Howard W. Dixon
Mr. H.Y. Reynolds

Mr. Rachlin (Deny further extension)

COLLIMORE, FITZPATRICK, FRAY & DALY
ATTORNEYS AND COUNSELORS AT LAW

DONAL M. COLLIMORE
JOHN T. FITZPATRICK
T. F. GILROY DALY *
JOHN P. FRAY
DONAL C. COLLIMORE
* ADMITTED TO THE BAR OF NEW YORK AND CONNECTICUT

P. O. BOX 271
1293 POST ROAD
FAIRFIELD, CONNECTICUT 06433
TELEPHONE 259-7804

NEW YORK OFFICE
15 WEST 44TH STREET
NEW YORK, NEW YORK 10036
TELEPHONE TN 7-0613

April 6th, 1965

To Mr. Greenberg No. 1 2400

Carl Rachlin, Esquire
c/o CORE
38 Park Row
New York, NEW YORK

Dear Mr. Rachlin:

Enclosed please find brief on the appeal of Wechsler versus County of Gadsden, Florida.

The various indices are paginated in accordance with the typewritten brief and presumably the printer will make whatever revisions are necessary.

Very truly yours,

Donal C. Collimore

Donal C. Collimore

DCC:dd
enclosure

cc: Henry Schwarzschild
Ninth Floor, 156 Fifth Avenue
New York, NEW YORK

Mel looking at it - HS send to printer unless he hears to contrary

JOHN LOWENTHAL
521 FIFTH AVENUE
NEW YORK, N.Y. 10017
MO 1-2480

September 13, 1965

Howard W. Dixon, Esq.
Seybold Building
Miami 32, Florida

Re: Wechsler, et al. v. County of Gadsden

Dear Mr. Dixon:

Thank you for your letter of August 25, advising me that the Clerk of the Court of Appeals for the Fifth Circuit has set the above case for argument on October 8 in Jacksonville, Florida.

Mr. Collimore and I have discussed the matter and agreed that I will argue the case.

You have our brief, and you are no doubt aware of the later Cox and Peacock decisions. In preparing for the argument, I would appreciate all comments and suggestions that you (and others who receive copies of this letter) would be kind enough to make.

Sincerely,

JL:jjw

cc: Donal C. Collimore, Jr.
Earl Johnson
Carl Rachlin
Melvin L. Wulf
John Due
Henry Schwartzschild

Rachel's copy

JOHN LOWENTHAL
521 FIFTH AVENUE
NEW YORK, N.Y. 10017
MO 1-2480

October 18, 1965

Mr. Henry Schwarzschild
L.C.D.C.
156 Fifth Avenue
New York, N.Y. 10010

Re: Wechsler, et al. v. County of Gadsden

Dear Henry:

The case was heard by the Court of Appeals for the Fifth Circuit in Jacksonville on October 8. The panel consisted of Judges Jones, Bell, and Johnson (District Judge, Montgomery, Ala.).

Judges Jones and Bell were outspokenly unsympathetic to our position that this removal-and-remand case is already ripe for dismissal. Judge Johnson said nothing.

It is a safe bet that the court will follow its recent pattern: reverse and return the case to the District Court for a hearing. An adverse result from any hearing in the District Court may reasonably be anticipated.

Assuming that the Court of Appeals does not order dismissal but simply reverses for a hearing in the District Court, we should consider whether to request a hearing before the Fifth Circuit en banc, or to petition for certiorari.

The law in this area might develop swiftly; certiorari was granted in Rachel on October 11, and Rachel's cross-petition, I am advised, asks for outright dismissal.

The question is (1) whether we should protect our position for dismissal by applying for rehearing or certiorari in the hopes of succeeding on the merits (or the coattails of a favorable Rachel decision), or (2) whether we should avoid the risk of an adverse decision in Rachel (i.e., upholding the District Court's remand) and taking our hearing in the District Court while we can get it.

On the facts, if not the local historical pattern of discrimination, Wechsler is probably stronger or at least more colorful than Rachel: In Wechsler, the County of Gadsden, notwithstanding its prior receipt of the removal papers ousting it of jurisdiction, nevertheless went right ahead and purported to prosecute three of the seven petitioners, as the District Court found in granting writs for habeas corpus.

Please advise me of your views in the situation, including any news of petitions for certiorari or pertinent developments in other remand cases.

Sincerely,

JOHN LOWENTHAL

JL:jjw

cc.: Anthony G. Amsterdam
Howard W. Dixon
Donal C. Collimore, Jr.
Earl Johnson
Carl Rachlin
Melvin L. Wulf
John Due

MSS SEDFRE
546

WELFARE RESIDENCY CASE of LILLIAN JOHNSON AKRON, OHIO 1968

Box 44
Folder 5

State Historical Society of Wisconsin

Please Retain Original Order

[Enclosed, Raelin to Goldberger, 1968, October 25]

DRAFT COMPLAINT--AKRON RESIDENCE CASE

1. The jurisdiction of this Court is invoked under Title 28, U.S.C. Sec. 1343, 42 U.S.C. Sec. 1983, 28 U.S.C. Secs. 2281, 2284, and 28 U.S.C. Secs. 2201, 2202, this being an action for declaratory judgment and preliminary and permanent injunction to redress the deprivation under color of state law of rights, privileges, and immunities secured to plaintiffs by the United States Constitution.

2. The plaintiffs are:

(a) Lillian Johnson and her minor children, _____, age one y and _____, age two years, citizens of the United States (and resident s of the State of Ohio) with their place of residence at 698 Edgewood Avenue, Akron, Ohio.

(b) All other persons, citizens of the United States residing in the State of Ohio, who would otherwise be entitled to public assistance, ~~except that they have not~~ resided in Ohio ~~during the~~ immediately preceding ~~(one year).~~ for less than one year, because such persons have received or have pending such ~~payments~~ application for assistance

3. Lillian Johnson, _____, and _____ fairly and adequately represent the class of persons described in paragraph 2(b) above, on whose behalf they sue, and the persons constituting said class are so numerous as to make it impractical to bring them all before this Court. & others similarly situated

4. The defendants are:

(a) John Poda, Charles F. Madden, Jr., and Victor Herbert, Commissioners of the Summit County Welfare Department, and are duly appointed and qualified Commissionars of the said Department and citizens of the State of Ohio,;

(b) Clair V. Kibler, Director of the Summit County Welfre Department and a citizen of the State of Ohio;

(c) _____, (Secretary) of the Ohio State Department of Public Welfare;

(d) _____, Attorney General of the State of Ohio and a citizen thereof.

The foregoing public officers are charged ~~with~~, under (the Public Assistance Law of the State of Ohio) with the enforcement, operation, and execution of the provisioms

thereof. The Commisioners of the Summit County Welfare Department and the Director of said County Department are particularly charged with the administration of public assistance and the determination of the eligibility of applicants and the continued eligibility of persons receiving assistance in accordance with said law. The (Public Assistance Law) of the State of Ohio was enacted on _____, (cite) _____. The relevant provisions of the Said Act (, as amended,) are attached hereto as Exhibit A.

5. The Act of (cite:) _____, provides that ~~xxxxxxxxxx~~ assistance shall be granted only to or on behalf of a resident of Ohio who has resided therein for at least (one year) immediately preceding the date of application for public assistance.

6. Plaintiffs have resided at 698 Edgewood Avenue, Akron, Ohio, since June, 1968, when they came to Ohio ~~xxxx~~ from Los Angeled, California. ~~The~~ plaintiffs intend to reside permanently in the State of Ohio.

7. Plaintiff and her two small children came to Akron, Ohio in June of 1968 for the purpose of rejoining the plaintiff's sister, _____, _____, and of seeking _____'s moral support and general assistance in raising _____ and _____.

[illegible]

8. _____, Plaintiff's sister, was unable without great hardship to support plaintiff and her children, because ---------- ~~and her children had no income~~ sole source of income for herself and her seven children consisted of public assistance payments.

9. On _____, 1968, plaintiffs made application for public assistance from the Summit County Welfare Department. They received one food order.

N.B. - This reason not explicitly given in letter

10. By letter dated August 1, 1968, the Defendant County Welfare Department notified the plaintiffs that the Department would provide no further assistance to them because they were not residents of Ohio. (?) within the meaning

11. Assistance to the plaintiffs was terminated solely because they did not satisfy the statutory requirement of (one year's) residence immediately preceding their application.

12. Plaintiff Lillie Johnson is without any funds, property or other source of income. She and her two children, ages one and two years, are ~~ok~~ at this time ~~currently~~ entirely ~~depending~~ on said sister's limited financial resources ~~ability to~~ cannot provide them with the ~~barest~~ essentials of life. Pltfs, as a result of the denial of assistance, are The plaintiffs, because they have been denied public assistance, are living in a small apartment which they share with _____ and her seven children. There are now nine children and two adults living in an apartment with four small bedrooms. Plaintiffs are in immediate and irrevocable need of public assistance and but for the residence requirement are fully entitled to receive it. Plaintiffs are suffering and will continue to suffer immediate and irreparable injury from the denial of public assistance; that pltf. children may suffer irreparable damage to their health.

Cuyahoga County Nurses

15

~~13~~. The Act of (cite----------

---

requiring as a condition of public assistance that plaintiffs reside in Ohio (for one year immediately preceding application) is contrary to the United States Constitution in that,

(a) the purpose of said act is to exclude indigent citizens from Ohio, which purpose is impermissible and repugnant under the privileges and immunities clause of the Fourteenth Amendment, the equal protection and due process clauses thereof, and under the commerce clause, Article I, Section 8 of the Constitution;

(b) said act burdens, penalizes, and obstructs ~~poor~~ the free movement of persons ~~exxthexexerxixexbyxcitizensxofxthexUnitedxStatesxofxthex Rightxfreelyxtoxmove~~ from State to State, contrary to the commerce clause, Article I, Section 8 of the Constitution;

z(c) said Act burdens, penalizes and obstructs the exercise by citizens of the United States of the right freely to move from State to State, a right ~~to~~ of national citizenship secured by the privileges and immunities clause of the Fourteenth Amendment;

(d) said Act arbitrarily and unreasonably discriminates between citizens of the United States, non-residents of Ohio, hindering the movement into Ohio only ofthose citizens who are poor, an invidious discrimination in violation of the ~~Fourteenth~~ equal protection clause of the Fourteenth Amendment;

(e) said Act unreasonably denies citizens of other states privileges and immunities accorded citizens of Ohio, contrary to Article IV, Section 2 of the Constitution;

(f) said Act arbitrarily and unreasonably ~~a~~

This is a separate claim under Art. 4 of the Constitution, which will be argued by Mr. Clark

SUMMIT COUNTY WELFARE DEPT.

695 S. Main St.
762-0681
AKRON, OHIO 44311

COMMISSIONERS
JOHN PODA
CHARLES F. MADDEN, JR.
VICTOR HERBERT

AID TO DEPENDENT CHILDREN—UNEMPLOYED
AID TO DEPENDENT CHILDREN
AID TO BLIND
AID FOR THE AGED

CLAIR V. KIBLER
DIRECTOR

[redacted]

AID FOR PERMANENTLY DISABLED
SERVICES TO CRIPPLED CHILDREN
GENERAL RELIEF

* PLEASE ADDRESS REPLY
ATTENTION OF WRITER

August 1, 1968

Mrs. Lillie Johnson
698 Edgewood Avenue
Akron, Ohio 44307

Dear Mrs. Johnson:

We have received verification of your legal residence and authorization to return you to California.

This is to inform you that there will be no further assistance from this agency.

Please contact us immediately if you have nay questions.

Very truly yours,

SUMMIT COUNTY WELFARE DEPARTMENT

Olive Yukie
(Mrs.) Olive Yukie
Caseworker

Approved by:

Clair V. Kibler
Clair V. Kibler
Director

Helen Stockslager
(Mrs.) Helen Stockslager
Casework Supervisor

OY:pt

August 15, 1968

Mr. Clair V. Kibler, Director
Summit County Welfare Department
695 S. Main Street
Akron, Ohio 44311

Re: Lillie Johnson
698 Edgewood Avenue
Akron, Ohio

Dear Mr. Kibler:

Enclosed please find a letter submitted by your department concerning Mrs. Johnson.

This letter clearly indicates the position of Summit County Welfare regarding any further assistance to our client. Prior to taking any further action in this matter we request your reconsideration in view of the discretionary power that you have as director. It is our understanding that such power is yours to exercise should you so desire and we plead with you not to force Mrs. Johnson to return to California.

We are told by your caseworker that possibilities exist whereby California might arrange to transfer welfare checks to Ohio. Should this be possible we suggest that a request from your office would be far more effective than one coming from our client. Certainly that would be an act of assistance which Summit County, under its present manual regulations, is not prohibited.

COPY

In short, we are asking that you as the director of the Summit County Welfare do whatever you possibly can to secure her right to remain in Akron, which seems to be her desire. I might indicate that her intent in coming to Ohio and Summit County was not to gain benefits or to take advantage of our state, but rather a domestic problem made it necessary for her to seek out her close relatives for moral support. Her present living quarters are near intolerable since she is living with her sister who is on welfare with seven children of her own.

Your immediate and prompt attention to our request is urged and appreciated. With kindest personal regards,

I remain

Sincerely yours,

Gustav Goldberger
Attorney at Law

GG/em

c.c. Mrs. Olive Yukie
Caseworker

Mrs. Helen Stockslager
Caseworker Supervisor

BUREAU OF SOCIAL SCIENCE RESEARCH, INC.
1200 SEVENTEENTH STREET, N.W., WASHINGTON, D. C. 20036
TELEPHONE (202) 223-4300

August 22, 1968

Gustav Goldberger, Esq.
Summit County Legal Aid Society
80 West Center Street
Akron, Ohio 44308

Dear Mr. Goldberger:

I am writing to let you know that this organization has been engaged by the Office of Economic Opportunity to provide certain social science help to the Neighborhood Legal Services Program. The Bureau's research will be largely related to cases instituted by legal service lawyers and their clients which challenge laws and practices apparently discriminating against the poor in such fields as welfare, housing, and consumer finance. The following are examples of the sorts of cases with which we would expect to deal:

1. Welfare

   a. Elimination of "man-in-the-house" (substitute parent) rule as criterion for eligibility for welfare.

   b. Imposition of requirement of fair administrative hearing prior to the termination of welfare.

   c. Elimination of "maximum grant" limitation on assistance.

   d. Elimination of "employable mother" role as criterion for welfare.

2. Housing

   a. Elimination of "retaliatory evictions" as unconstitutional.

   b. Requiring apartments to comply with housing code before rent can be collected.

   c. Allowing tenant-filed mandatory injunctions to require landlords to comply with housing codes.

TRUSTEES: W. PHILLIPS DAVISON ROBERT T. BOWER ELLSWORTH BUNKER G. FRANKLIN EDWARDS GEORGE GALLUP
ALFRED WINSLOW JONES PAUL F. LAZARSFELD HERBERT J. MILLER, JR. M. BREWSTER SMITH PAUL A. SMITH

3. Consumer Protection

   a. Elimination of "holder-in-due-course" doctrine.

   b. Eliminating garnishment before judgment as unconstitutional.

   c. Increase in exemptions allowed under garnishment law.

The Bureau's basic task will be to assemble pertinent data from past social science research studies, government statistical series, and summary conclusions from social and economic research studies, to analyze such data to bring them to bear upon the issues of fact in the particular cases being prepared by OEO neighborhood service attorneys, and to present the results in report form. In this effort the Bureau will explore new approaches in the utilization of social science data and conclusions in respect to their bearing on legal questions under study.

In addition it is expected that we will collect original data (e.g., through small-scale surveys) when it appears that available data are insufficient or inconclusive and when new data might add significantly to the illumination of issues involved in the case.

At this point we do not know how many individual requests there might be, or what range of issues they might encompass. We would like to concentrate on those cases that occur frequently in various places so that whatever benefits there are from our efforts will be as helpful to as many programs as possible.

I would very much appreciate hearing from you about particular cases now under litigation, or foreseen in the near future, where you think that organized social science data could be of assistance. This information will be extremely helpful to us in selecting the most generally applicable cases.

Sincerely yours,

Robert T. Bower

Robert T. Bower by NDB
Director

RTB:rg

Summit County Legal Aid Society
NEIGHBORHOOD LEGAL SERVICES
WOOSTER-LANE BRANCH
300 WOOSTER AVE.
AKRON, OHIO 44307
TELEPHONE
216 - 762-0338

GENERAL COUNSEL
EXECUTIVE DIRECTOR
JAMES J. GILL

ASSOCIATE GENERAL COUNSEL
PROJECT DIRECTOR
GUSTAV GOLDBERGER

STAFF ATTORNEYS
WESLEY B. SMITH
JOHN R. GULDIN
BERNARD M. SCHWARTZ
PATRICIA A. VANCE

September 6, 1968

Mr. Carl Rachlin
S.E.D.F.
164 Madison Avenue
New York, New York 10016

Dear Carl:

Pursuant to our telephone conversation today, the following are the facts pertaining to the 'residence' case.

Our client, Lillie Johnson, presently residing at 698 Edgewood Avenue, has been on welfare in Los Angeles, California for some time until her departure for Akron, Ohio, some time in June of 1968. She left California due to domestic difficulties with her husband, Melvin Johnson, and sought moral support and general assistance from her sister who resides in Akron at the address indicated above. Our client has two small children with her, ages one and two, and her sister with whom she resides is on welfare through Summit County Welfare Department, receiving aid from Aid for Dependent Children of which she has seven. Accordingly, there are now nine children living at this apartment containing four small bedrooms.

Mrs. Johnson, soon after her arrival, made application for welfare assistance with the Summit County Welfare Department. She received one food order and was informed that being a nonresident of Ohio, she would no longer be able to receive further assistance from the agency. Our client came to the Neighborhood Legal Services on July 24, 1968 at which time we initiated a dialogue with the Summit County Welfare Department with respect to some additional assistance.

Enclosed you will find a copy of a letter that was sent to our client in response to our request which is self-explanatory. Enclosed, also, please find a copy of a

letter submitted by our office to the Welfare Director, Mr. Kibler, which has as yet been ignored. Our client, at present, is unemployed and has no funds, She relies entirely upon whatever her sister, Evelyn Hendon, is able to do for her. In addition, she alleges that her purpose was not to take advantage of the State. If anything, it is our understanding that Welfare's assistance in California is somewhat more attractive to a welfare client. She further states that she does not wish to return to California and that she desires to stay and remain in Ohio.

Any further detail that you may require, don't hesitate to call me collect and I will attempt to answer whatever questions you may have in connection with this case. If you recall, I was also talking in terms of filing a temporary injunction for an order requiring the Welfare Director to pay out funds pending the outcome of the litigation. The pleadings, therefore, should reflect this request. We are hopeful to file the pleadings in Cleveland on the federal level and whatever assistance you could lend in connection with the proper procedure with respect to the entire case, would be greatly appreciated.

I am also sending you a copy of the letter that I received from the Bureau of Social Science Research Inc. that you requested. Finally, might I say that we are very anxious to get the matter started as soon as possible and should you find it impossible to give immediate attention to this case, kindly notify me as soon as possible in order that we might help each other expedite the drafting of the pleadings.

Thank you so much for your interest and help.

Sincerely yours,

Gustav Goldberger

Gustav Goldberger
Attorney at Law

GG:ms

Enclosures

SCHOLARSHIP,
EDUCATION AND
DEFENSE
FUND FOR
RACIAL EQUALITY inc.
164 MADISON AVENUE
NEW YORK, N.Y. 10016
(212) 532-8216

September 12, 1968

Gustav Goodberger
300 Wooster Avenue
Akron, Ohio 44307

Dear Gus,

Thanks for sending us the information on the 'residence case. We will begin work on it right away.

Right now, however, I thought you might be interested in the rough draft of the complaint of the 'adequacy' case which is going on in Columbus. If you would like to comment, we'd appreciate your suggestions.

Yours truly,

Carl Rachlin

Contributions are deductible for income tax purposes

▪ *president:* Andrew E. Norman ▪ *vice presidents:* William S. Ellis, Nannette Sachs ▪ *secretary:* Ezra Levin ▪ *treasurer:* Shelley Appleton ▪ *executive director:* Marvin Rich ▪ *leadership development director:* Ronnie M. Moore ▪ *legal director:* Carl Rachlin ▪ *BOARD OF DIRECTORS:* Nils R. Douglas, *chairman* ▪ James Baldwin ▪ Katrina McCormick Barnes ▪ Allan Barton ▪ Jonathan Bingham ▪ Canon James P. Breeden ▪ Robert Curvin ▪ Charlotte Devree ▪ Robert F. Drinan, S.J. ▪ Michael O. Finkelstein ▪ Doris Freedman ▪ James T. Harris, Jr. ▪ Claude Heckscher ▪ Norman Hill ▪ Arthur Kimmelfield ▪ Dr. Archie Lacey ▪ Jeremy Larner ▪ Joann List Levinson ▪ John Lewis ▪ Leon Modeste ▪ Henry Morgenthau, III ▪ Dr. William Stuart Nelson ▪ Edward Norton ▪ Richard J. Schwartz ▪ Elaine Slater ▪ Rowland Watts

SCHOLARSHIP,
EDUCATION AND
DEFENSE
FUND FOR
RACIAL EQUALITY inc.
164 MADISON AVENUE
NEW YORK, N.Y. 10016
(212) 532-8216

October 25, 1968

Mr. Gustav Goldberger
Summit County Legal Aid Society
Neighborhood Legal Services
Wooster-Lane Branch
300 Wooster Avenue
Akron, Ohio 44307

Dear Gus,

Enclosed is the proposed draft. Please edit it carefully and advise us of any changes you wish to be made.

Of course we are prepared to help you with any motions, interrogatories, or depositions, and with the actual trial.

I look forward to seeing you soon.

Sincerely yours,

Carl

Carl Rachlin

CR/llb

Enclosure

Contributions are deductible for income tax purposes

■ *president:* Andrew E. Norman ■ *vice presidents:* William S. Ellis, Nannette Sachs ■ *secretary:* Ezra Levin ■ *treasurer:* Shelley Appleton ■ *executive director:* Marvin Rich ■ *leadership development director:* Ronnie M. Moore ■ *legal director:* Carl Rachlin ■ *BOARD OF DIRECTORS:* Nils R. Douglas, *chairman* ■ James Baldwin ■ Katrina McCormick Barnes ■ Allan Barton ■ Jonathan Bingham ■ Canon James P. Breeden ■ Robert Curvin ■ Charlotte Devree ■ Robert F. Drinan, S.J. ■ Michael O. Finkelstein ■ Doris Freedman ■ James T. Harris, Jr. ■ Claude Heckscher ■ Norman Hill ■ Arthur Kimmelfield ■ Dr. Archie Lacey ■ Jeremy Larner ■ Joann List Levinson ■ John Lewis ■ Leon Modeste ■ Henry Morgenthau, III ■ Dr. William Stuart Nelson ■ Edward Norton ■ Richard J. Schwartz ■ Elaine Slater ■ Rowland Watts

Summit County Legal Aid Society
NEIGHBORHOOD LEGAL SERVICES
WOOSTER-LANE BRANCH
300 WOOSTER AVE.
AKRON, OHIO 44307
TELEPHONE
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GENERAL COUNSEL
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PROJECT DIRECTOR
GUSTAV GOLDBERGER

STAFF ATTORNEYS
WESLEY B. SMITH
JOHN R. GULDIN
BERNARD M. SCHWARTZ
PATRICIA A. VANCE

November 26, 1968

Mr. Carl Rachlin, Legal Director
Scholarship Education & Defense
Fund for Racial Equality
164 Madison Avenue
New York, New York 10016

Re: Residence Case

Dear Carl:

As so often the case with Legal Aid clients, one works hard, one prepares, one does research, and one winds up without a client. Mrs. Johnson suddenly left for California without prior notice to our office, and I have not heard from her since. There is a chance that she may return but it is doubtful.

I have forwarded a copy of your pleadings to Bob Blattner for further reference and for a sample to other Ohio Legal Aid offices.

I want you to know that I personally appreciate your efforts and hope to work with you again in the future. With kindest personal regards, I remain

Sincerely yours,

Gustav Goldberger

Gustav Goldberger
Attorney at Law

GG:ms

1. This is a suit for injunctive relief authorized by Title 42 USC Sec. 1983 to be commenced by any citizen of the United States or other persons within the jurisdiction thereof to redress the deprivation under color of statute, ordinance, regulation, custom or usage of the state of rights, privileges and immunities secured by the Constitution and the laws of the United States. The rights, privileges and immunities sought herein to be redressed are those secured by the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, ~~by the Social Security Act, 42 USC Secs. 601-609, and by Sec. 601 of the Civil Rights Act of 1964.~~ ~~This is also a suit for a declaratory judgment pursuant to Title 28 USC Sec. 2201 of rights established by the aforementioned constitutional and statutory provisions.~~

2. Plaintiffs bring this action on their behalf and on behalf of all the other persons similarly situated pursuant to Rule 23 (a) and (b) (2) of the Federal Rules of Civil Procedure. The members of the class similarly situated are needy mothers and dependent children in the State of ~~South Carolina~~ Ohio otherwise eligible for Aid to Dependent Children payments whose financial assistance has been terminated or denied on the ground of the ~~aforementioned "common-law relationship" regulation.~~ regulation imposing a durational residence requirement The members of this class are so numerous as to make joinder impractical; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; the representative parties fairly and adequately protect the interests of the class; and the State of ~~South Carolina~~ Ohio has acted on grounds generally applicable to the class, thereby making ~~appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.~~

~~a violation of Section 601 of the Civil Rights Act of 1964.~~

3. Jurisdiction is conferred on this Court by 28 USC 1343 (3) and (4) providing for original jurisdiction of this Court in suits authorized by 42 USC Sec. 1983, jurisdiction is further conferred on this Court by 28 USC Secs. 2201 and 2202 relating to declaratory judgments and by 28 USC Sec. 2281 and 2284 providing for a three-judge Court.

4. Plaintiffs have been denied assistance provided for citizens of ~~South Carolina~~ Ohio under the ~~Code of Laws of South Carolina Sec. 71-11,~~ and Title 42 USC Secs. 601-609, on the basis of the ~~South Carolina "common law relationship"~~ Ohio residence requirement regulation.

Ohio

5. Plaintiffs bring this action on their behalf and on behalf of all the other persons similarly situated pursuant to Rule 23 (a) and (b) (2) of the Federal Rules of Civil Procedure. The members of the class similarly situated are needy mothers and dependent children in the State of ~~South Carolina~~ Ohio otherwise eligible for Aid to Dependent Children payments whose financial assistance has been terminated or-denied on the ground of the aforementioned ~~"common-law relationship" regulation~~ residence requirement. The members of this class are so numerous as to make joinder impractical; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; the representative parties fairly and adequately protect the interests of the class; and the State of ~~South Carolina~~ Ohio has acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

~~5.~~ 6. Defendants make up the ~~South Carolina~~ Ohio Board of Public Welfare under which the State Department of Public Welfare operates, Code of Laws of South Carolina Sec. 71-1, and which appoints the State Director of Public Welfare who executes the decisions and carries out the policies of the Board and who sees that the laws relating to the activities and responsibilities of the Board are obeyed, and who is the administrative head of the State Department of Public Welfare, Code of Laws of South Carolina Sec. 71-5. The State Department of Public Welfare is authorized to:

(1) Supervise and administer the public welfare activities and functions of the state, and

(2) adopt all necessary rules and regulations and formulate policies and methods of administration, when not otherwise fixed by law.

Structure in Ohio??

The State Department of Public Welfare has published the manual which contains the ~~"common-law relationship" regulation.~~ regulation imposing a durational residence requirement of one year Defendants make up the County Board of Public Welfare which acts as the representative of the State in administering welfare activities within County. ~~CLSC Sec. 71-36.~~

Defendant _____ is the County Director of _____ County's public assistance program and is the chief executive officer of the county organization performing those duties assigend to him by the county board the State Department, or law. CLSC Sec. 71-34.

7. Under the Code of Laws of South Carolina Sec. 71-99, the County Department is directed to grant aid to the families in South Carolina with "dependant children."

8. The Code of Laws of South Carolina Sec. 71-91 defines "dependent child" as one under the age of eighteen years who has been deprived of parental support or care by reason of the death, continued absence from home or physical or mental incapacity of a parent and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or neice in a place of residence maintained by one or more of such relatives at his or their own home and who, if not granted aid, is likely to become a public charge or who would otherwise be deprived of proper support, care or training or a child under the age of twenty-one who is attending high school or college or regularly attending a course of vocational or technical training.

9. In all respects, but for the "common-law relationship" regulation promulgated and enforced by Defendants, Plaintiffs, and the other members of their class, qualify for and are entitled to benefits under the South Carolina Aid to Dependent Children program:

(a) one legal parent is absent from the home.

(b) the children are in the home of a relative included in the statute

(c) all children are under 18 or are in school and under 21

(d) all have lived in the state for over a year, or have been born within a year to one who has lived in the state for over a year.

(e) the income of the relative with whom they are living is below the minimum standard promulgated by Defendants as being necessary for a subsistence compatible with decency and health

10a. The "common-law relationship" regulation by which Plaintiffs are denied assistance is included in The Manual among the definitions of persons who are considered "parents" for the purposes of determining welfare eligibility:

"(a) The legal father or mother; i.e., the parents are legally married, including recognized common-law marriage; and adoptive parents .....

(b) A man who is living in common-law relationship with a woman and residing in the home with her, whether or not they are legally married by license. (The common-law relationship would set up a step-parent relationship with children not his own.)"

Manual, Vol. IV, Ch. 2, Sec. C, 2, d., (1) (a) and (d). Definition of a Parent, p. 39.

10b. The manual further explains that the State Department of

contracting any legally valid marriage in South Carolina.

16. In King v. Smith, No. 949, 36 U.S.L.W. 4703 (June 17, 1968), the Supreme Court of the United States construed 42 U.S.C. Sec. 606 to include in its definition of "parent" only those persons legally liable for the care and support of the child.

17. The Aid to Dependent Children programs of all states must conform to the terms of the federal statutes defining the scope of the federal social security program if those states are to receive federal support for their programs 42 U.S.C. 601-609.

18. Federal funds under 42 U.S.C. 601 et seq. make up a major share of Aid to Dependent Children payments in South Carolina, and so, by the terms of the federal statute, South Carolina is bound by the authoritative interpretation of that statute by the United States Supreme Court.

19. Upon information and belief, the Defendants have applied their "common-law relationship" regulation so as to disqualify from Aid-to Dependent Children benefits only or virtually only Negro mothers and children and not white mothers and children.

20. By promulgating, adopting and enforcing the "common-law relationship" regulation, and on ground of said regulation terminating and denying Aid to Dependent Children financial assistance to Plaintiffs and all other members of their class, Defendants, acting under the color of State Law, have unlawfully deprived Plaintiffs and the other members of her class of their Constitutional right to due process and the equal

protection of the laws of ~~South Carolina~~ Ohio, contrary to the provisions of 42 U.S.C. Sec. 1983, further Defendants have deprived Plaintiffs, and the other members of their class, of Aid to Dependent Children benefits in violation of their rights under the Federal Social Security Act, as amended, 42 U.S.C. 601-609, and of their right to be free from racial discrimination in the determination of their eligibility for participation in a federally assisted program, as guaranteed by Sec. 601 of the Civil Rights Act of 1964, in the following manner:

A. Defendants have deprived Plaintiffs, and all others similarly situated, of due process of lay by denying them property to which they have a statutory right by ~~arbitrarily assigning them to a status for which, according to South Carolina Law, they do not qualify~~ requiring ~~a~~ durational residence of at least one yr.

B. Defendants have deprived Plaintiffs, and all others similarly situated of due process of law by placing the burden on them to prove that they have not entered into common-law marriages, despite their assertions that they do not intend, and have never intended, to live as man and wife, or that they are not free to contract marriage, when no compelling proof of common-law marriage was presented prior to their being denied admission to or being removed from the role of those receiving Aid to Dependant Children benefits.

C. Defendants have deprived Plaintiff's needy and dependent children, and the needy and dependent children of all others similarly situated, of the equal protection of the law by arbitrarily ~~and irrationally classifying~~

them as ineligible for Aid to Dependent Children benefits on the ground of their ~~mother's relationship with a man, which relationship places no legal liability for their support on said man, and leaves them deprived of the support of one parent, which deprivation is statutorily the basis of eligibility for Aid to Dependent Children benefits.~~

D. Defendants have deprived Plaintiffs and all others similarly situated, of the equal protection of the law by promulgating and enforcing a regulation which creates a second definition of common-law marriage in South Carolina, this definition to be applicable only to welfare recipients; while the prior court-made definition remains applicable to all others. The basis for this distinctive classification is not related to any legitimate govermental purpose.

E. Defendants have deprived Plaintiffs and their needy and dependent children, and all others similarly situated, of their rights, and of property to which they have a right, under the federal statutes defining the Aid to Dependent Children Program, 42 U.S.C. 601 et seq., as those statutes were authoritatively construed by the United States Supreme Court in the case of King v. Smith, No. 949, 36 U.S.L.W. 4703 (June 17, 1968) by construing the term "parent" to include one involved in a "common-law relationship" with the woman who is an applicant for, or recipient of, Aid to Dependent Children benefits.

F. Defendants have deprived Plaintiffs and their needy and dependent children, and all others similarly situated, of the equal protection of the laws by applying the "common-law relationship" regulation in such a manner as to disqualify Negro applicants and recipients but not white applicants and recipients.

G. Defendants have deprived Plaintiffs and their needy and dependent children, and all others similarly situated, of their right ~~to be~~ of free travel between the states ~~free from racial discrimination~~ in the determination of their eligibility for participation in a federally assisted program, in violation of Sec. 601 of the Civil Rights Act of 1964.

20. Plaintiffs and the class which they represent have suffered damage to their health and well-being, the health and well-being of their children, and damage to their family life, and will continue to suffer severe and irreparable injury because of the aforesaid regulation complained of herein until said regulation is declared unconstitutional and illegal and is enjoined by this Court. No adequate administrative remedy or adequate remedy at law is available to plaintiffs.

Wherefore, plaintiffs on behalf of themselves and all others similarly situated respectfully pray:

(1) That a three-judge Court be convened

to determine this controversy pursuant to 28 U.S.C. Sec. 2281

(2) That this Court enter a declaratory judgment pursuant to 28 U.S.C. Sec. 2201 declaring the durational residence requirement ~~"common-law relationship" regulation~~ of the Ohio ~~South Carolina~~ Department of Public Welfare, as contained in ~~Vol. IV, Ch. 2, Sec. C, 2, d., (1), (d)~~ of The Manual of that Department, void and of no effect insofar as it denies eligibility to Plaintiff, her needy and dependent children and all others similarly situated on the ground that ~~a "common-law relationship creates a duty of parental support in the party to that relationship who has no other connection to the children or to the relative with whom they are living, their remaining natural parent; and further declaring that said regulation is repugnant to the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States;~~ and further declaring that said regulation is contrary to the authoritative interpretation of the Social Security Act, 42 U.S.C. Secs. 601-609, as handed down by the United States Supreme Court in King v. Smith, supra; ~~and further declaring that said regulation applied to disqualify only, or nearly only, Negro applicants and recipients of Aid to Dependent Children benefits is a violation of Sec. 601 of the Civil Rights Act of 1964 in~~

~~that it is a means of racially discriminating in the determination of eligibility for participation in a federally assisted program;~~ and further declaring that Defendants are required to consider the eligibility for Aid to Dependent Children of Plaintiffs and all others similarly situated without reference to said ~~"common-law relationship"~~ regulation, imposing a durational residence requirement of one year.

(3) That this Court enter a permanent injunction restraining each defendant, their successors in office, agents and employees from enforcing the ~~"common-law relationship"~~ durational residence regulation contained in ~~Volume IV, Chapter 2, Section C, 2, d., (1), (d) of~~ the Manual of the ~~South Carolina~~ Ohio Department of Public Welfare and order them to consider the eligibility of Plaintiffs, etc. for Aid to Dependent Children benefits .

(4) That pending the determination of the prayer for permanent injunction this Court issue a preliminary injunction, restraining each defendant, their successors in office, agents and employees from enforcing the ~~"common-law relationship"~~ durational residence regulation of ~~the South Carolina~~ Ohio Department of Public Welfare, and ordering them to consider eligibility for Aid to Dependent Children of Plaintiff and her needy and dependent children and all others similarly situated without regard to

said regulation, and generally from doing any act or thing to carry out or enforce said ~~"common-law relationship" regulation.~~ residence requirement.

(5) That pending determination of the prayer for a preliminary injunction, this Court issue, after notice to defendants, an order temporarily restraining each defendant, their successors in office, agents and employees from enforcing the ~~"common-law relationship"~~ residence requirement ~~regulation~~ of the ~~South Carolina~~ Ohio Department of Public Welfare, and ordering them to consider eligibility for Aid to Dependent Children of Plaintiff and her needy and dependent children and all others similarly situated without regard to said regulation, and generally from doing any act or thing to carry out or enforce said ~~"common-law relationship" regulation.~~ residence requirement

(6) For such other and further relief as to the Court may seem just and proper.

Dated, ~~New York, N. Y.~~ Akron, Ohio, Sept. ~~August 29,~~ 1968

Attorney for Plaintiff

Common law marriage

1) intent by parties only essential
   C) present
   D) future
   B) to cohabit only
   A) to marry
2) proof of intent
   a) declarations or acknowledgements
   b) repute
   c) cohabitation
   d) all evidence to be judged in light of circumstances
   e) all is subject to rebuttal and counter-evidence

CLM

I — 1) <u>intent by parties only essential</u>

a) intent is essential because in S.C. marriage is a contract relationship.

b) intent without cohabitation is enough (dictum).

C. 1) <u>present</u>

a) intent must be that the parties <u>AT that time</u> become man and wife

b) but ~~no specific~~ it may not be possible, nor is it necessary, to specify a day or an hour at which the parties became man and wife.

D. 1) <u>future</u>

a) promise to marry in the future, even with cohabitation following, does not make the parties man + wife.

b) but if the later intercourse is intended as the execution of the earlier promise to marry in the future, the parties are man + wife.

A. 1) <u>to marry</u>

a) the intent of the parties must be that they take on the relationship of man and wife.

B. 1) <u>to cohabit only</u>

a) the intent to cohabit does not suffice to make the parties man and wife, even

if they do cohabit for a considerable time, and makes their relationship illicit at its inception.

b) If a relationship has begun which is illicit in its inception — either because the intent of the parties is only to cohabit, or because ~~the~~ one of the parties knowingly marries ~~while~~ during the life of a true spouse — only clear evidence of a change of intent will overcome the presumption that the nature of the relationship remains the same.

II <u>proof of intent</u>

A <u>declarations or acknowledgements</u>

a) the usual proof of common law marriage is by public declaration — ~~b) but if there is none, the separate or common acknowledgements~~ oral or written

b) but if there is none, the separate or common acknowledgements of the parties, in court or to private inquiry, is evidence of the marriage.

B <u>repute</u>

a) if there is general belief in the community that the two are man

and wife, this will be evidence of that relationship actually existing.
b) if there is division of opinion the question is for the jury.

C ~~reputa~~ <u>cohabitation</u>

a) cohabitation over a long period of time is evidence of marriage.
b) but the cohabitation must be open and in the nature of a husband-wife relationship.

D <u>all evidence to be judged in light of circumstances</u>

a) the law and custom of the area will be presumed to have been followed unless clear evidence to the contrary is given
b) re: acknowledgements
considerations of the pressure of decency & a desire for the childrens' legitimacy can temper acknowledgements of the marriage.
c) re: intent
where it appears that marriage would be prejudicial to the interests of one of the parties, clearer evidence of intent to marry will be required. (dicta)

E

<u>all is subject to rebuttal and counter-evidence</u>

a) Evidence of marriage is conclusive unless rebutted.

b) but the burden of going forward with proof is on the party claiming the marriage.

1 — Allen v Hall 2 Nott McC (11 S.C.L.) 114 (1819).

2 — Bannister v Bannister 150 S.C. 411, 148 SE 228 (1929).

3 — Ex parte Blizzard 185 S.C. 131, 193 SE 633 (1937).

4 — Campbell v Christian 235 S.C. 102, 110 SE2d 1 (1959).

5 Cave v Cave 101 S.C. 40, 85 S.E. 244 (1915).

6 — Cockrill v Calhoun 1 Nott McC (10 S.C.L.) 285 (1818).

7 — Davis v Whitlock 90 S.C. 233, 73 S.E. 171 (1911).

8 — Fryer v Fryer 9 S.C. Eq. (Rich. Cas.) 85 (1831).

9 — Howell v Littlefield 211 S.C. 462, 46 SE. 2d 47 (1947).

10 Jackson v U.S. 14 F. Supp. 132 (D.C. S.C. 1936).
aff'd 89 F.2d 572 (4th Cir. 1937).
aff'd. on other grounds 302 U.S. 628 (1938).

11 — Jewell v Magwood 9 S.C. Eq. (Rich. Cas.) 113 (1833).

12 Johnson v Johnson 235 S.C. 542, 112 S.E 2d 647 (1960).

13 — Lemon v Lemon 158 S.C. 71, 155 SE 285 (1930).

14 — Lucken v Wichman 5 S.C. 411 (1874).

15 — North v Valk, Dud. (13 S.C. Eq.) 212 (1837).

16 — Rodgers v Herron 226 S.C. 317, 85 SE 2d 104 (1954).
17 Rutledge v Tunno 69 S.C. 400, 48 SE. 297 (1904).
18 — Ex parte Romans 78 S.C. 210, 58 S.E. 614 (1907).

19 — State v Barefoot 2 Rich. (31 S.C.L.) 209 (1845).

20 — State v Britton 4 McC (15 S.C.L.) 256 (1827).

21 — State v Hilton 3 Rich (37 S.C.L.) 434 (1827).
22 State v Still 68 S.C. 37, 46 S.E. 524 (1903).
23 — State v Whaley 10 S.C. 500 (1878).

24 — State v Ward 204 S.C. 210, 28 S.E.2d. 785 (1944).

25 — Stringfellow v Scott 9 S.C. Eq. (Rich. Cas.) 109 (1833).
26 Tarleton v Thompson 125 S.C. 182, 118 S.E 421 (1922
27 — Tedder v Tedder 108 S.C. 271, 94 S.E. 19 (1917).
28 Tyson v Weatherly 214 S.C. 306, 52 S.E. 2d 410 (1949).

Discarded:
— Pooler v Smith 73 S.C. 102, 52 SE 967
— Bowers v Bowers 10 Rich (31 S.C. Eq.) 551
— St James v Mickey 26 SC 270, 2 S E 130 (1887)

2 (b) All other persons, citizens of the United States residing in the State of Ohio, who would otherwise be entitled to receive public assistance, and who have been denied aid solely because they have resided in Ohio for less than one year immediately ~~prior~~ preceding ~~applica~~ their application for assistance.

2. Plaintiff has been denied property to which she has a statutory right because of the enforcement of Ohio State Dep'r of P. Welfare Reg, which provides that

"

"

[no person may receive AFDC who has not resided in Ohio for at least one year immediately preceding app. for assistance.]

Marcus

4. Plaintiff Lillie Johnson is an adult citizen of the United States and is the mother of Plaintiff children, _____ Johnson, age one year, and _____ Johnson, age two years. In June of 1968, Plaintiff and her children left Los Angeles, California, and ~~sought to make their home in~~ came to Akron, Ohio, for the purpose of reuniting with Plaintiff's sister, _____, a resident of Akron, Ohio, and for the purpose of receiving from Plaintiff's sister both moral support and general assistance in bringing up Plaintiff's young children. The Plaintiff ~~sought to make her home in Akron, Ohio.~~ then intended, and continues to intend to make her home in Akron, Ohio.

5. The plaintiff and her two small children came to Akron, Ohio, from Los Angeles, California, ~~to~~ ~~wed~~ in June of 1968. The plaintiff came to Akron, Ohio for the purpose of rejoining her sister, who resides in Akron, and for the purpose of receiving her sister's moral support and general assistance in raising the plaintiff's children.

6. The plaintiff, having no other means of supporting her children, made application for welfare assistance with the Summit County Welfare Department. She received one food order, and was subsequently informed that she would receive no further assistance from the defendant agency because she did not meet the residence requirement for eligibility. The defendant agency offered to send the plaintiff back to California. The plaintiff ~~desires~~ wishes to ~~remain~~ make her home in Akron, Ohio.

7. The plaintiff is currently unemployed and has no means of supporting herself + her children. The plaintiff and her children are living with the plaintiff's sister, ~~[illegible]~~ ~~[illegible]~~. The plaintiff's sister receives AFDC for her 7 children and has no means of giving reasonable financial assistance to the plaintiff.

Reserve Reply Jury

8. By denying the plaintiff assistance on the sole ground that the plaintiff is not a resident of Ohio, defendant agency ~~is~~ has unlawfully denied the plaintiff equal protection of law.

9. In denying plaintiff assistance on the sole ground that the plaintiff is not a resident of Ohio, defendant has ~~seriously~~ abridged plaintiff's right freely to travel ~~among~~ between ~~the sta~~ two states of the U.S.

Furthermore, the defendant agency's enforcement of the residence requirement has a chilling effect on the free exercise by poor people of their right to travel ~~freely among the various states of the United States~~, from one state of the United States to another.

1. The jurisdiction of this Court is invoked under Title 28, U.S.C. Sec. 1343; 42 U.S.C. Sec. 1983, 28 U.S.C. Secs. 2281, 2284, and 28 U.S.C. Secs. 2201, 2202, this being an action for declaratory judgment and preliminary and permanent injunction to redress the deprivation under color of state law of rights, privileges, and immunities secured to plaintiffs by the United States Constitution.

2. The plaintiffs are Lillian Johnson and her two minor children, _____, age one, and _____, age two, citizens of the United Stated and residents of the state of Ohio with their place of residence at 698 Edgewood Avenue, Akron, Ohio.

#3. The plaintiffs bring his action on their behalf and on behalf of all otherr persons similarly situated, pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civi Civil Procedure. The members of the class similarly situated are all other persons, citizens of the United States residing in Ohio, who would otherwise be entitled to receive public assistance but who have been denied aid solely because they have resided in Ohio for less than one year. The members of this class are so numerous as to make joinder impractical; there are questions of law and fact common to the class; the claims of th the representative parties are typical of athe claims of the class; the representative parties fairly and adequately protect the interests of the class; and the defendants have acted on gr grounds generally applicable to the class, thereby making appropriate final injunctive releief and corresponding declaratory relief with respect to the class as a whole.

4. The defendants are:

(a) John Poda, Charles F. Madden, Jr., and Victor Herbert, Commissioners of the Summit County Welfre Department, and are duly appointed and qualified Commissionars of the said Department and citizens of the State of Ohio,;

(b) Clair V. Kibler, Director of the Summit County Welfre Department and a citizen of the State of Ohio;

(c) _____, (Secretary) of the Ohio State Departm ent of Public Welfare;

(d) _____, Attorney General of the State of Ohio and a citizen thereof.

The foregoing public officers are charged, under (the Public Assistance Law of the State of Ohio) with the enforcement, operation, and execution of the provisions

thereof. The Commissioners of the Summit County Welfare Department and the Director of said County Department are particularly charged with the administration of public assistance and the determination of the eligibility of applicants and the continued eligibility of persons receiving assistance in accordance with said law. The (Public Assistance Law) of the State of Ohio was enacted on _____, (cite) _____. The relevant provisions of the Said Act (, as amended,) are attached hereto as Exhibit A.

5. The Act of (cite:) _____, provides that ~~xxxxxxxx~~ assistance shall be granted only to or on behalf of a resident of Ohio who has resided therein for at least (one year) immediately preceding the date of application for public assistance.

6. Plaintiffs have resided at 698 Edgewood Avenue, Akron, Ohio, for less than one year, namely since June, 1968, when they came to Ohio from Los Angeles, California. As id set forth more fully below, the plaintiffs intend to reside permanently in the State of Ohio. The plaintiffs have not come to Ohio for the purpose of receiving public assistance.

INSERT 6a

7. The plaintiff and her two small children came to Akron, Ohio, in June of 1968 for the purpose of rejoining the plaintiff's sister, _____, and of seeking the said sister's comfort, moral support, and general assistance in raising _____ and _____. The plaintiff has no near relatives in California, and plaintiff's sister in Akron is the plaintiff's nearest living relative, other than plaintiff's children, both infants as described above.

8. _____, Plaintiff's sister, was unable without great hardship to support plaintiff and her children, because ---------- ~~and her 7 children had no income~~ sole source of income for herself and her seven children conssited of public assistance payments.

9. On _____, 1968, plaintiffs made application for public assistance from the Summit County Welfare Department. ~~Since~~ They received one food order.

10. By letter dated August 1, 1968, the defendant County Welfare Department notified the plaintiffs that ~~it~~ the said Department would provide no further assistance to them because they had not resided in Ohio for one year.

11. Assistance to the plaintiffs was terminated solely because they did not satisfy the statutory requirement of (one year's) residence immediately preceding their application.

12. Plaintiff Lillie Johnson is without any ~~xxx~~ funds, property, or other source of income. She and her two children, ages one and two years, are at this time entirely dependent on the said sister's ~~xxxx~~ limited financial resources. Said sister is unable to provide the plaintiffs with the essentials of life. The plaintiffs, as a result of the denial of public assistance, are reduced to a state of abject poverty, contrary to the purposes of _____.

Because they have been denied public assistance, the plaintiffs are living in a small apartment which they share with plaintiff's sister and her seven children. There are thus nine children and two adults living in an apartment with only four small bedrooms.

13. The Act of (cite----------

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requiring as a condition of public assistance that plaintiffs reside in Ohio (for one year immediately preceding application) is contrary to the United States Constitution in that,

(a) the purpose of said act is to exclude indigent citizens from Ohio, which purpose is impermissible and repugnant under the privileges and immunities clause of the Fourteenth Amendment, the equal protection and due process clauses thereof, and under the commerce clause, Article I, Section 8 of the Constitution;

(b) said act burdens, penalizes, and obstructs ~~per~~ the free movement of persons ~~exxthexexercixexbyxcitizensxofxthexUnitedxStatesxofxthex~~ ~~rightxfreelyxtoxmove~~ from State to State, contrary to the commerce clause, Article I, Section 8 of the Constitution;

z(c) said Act burdens, penalizes and obstructs the exercise by citizens of the United States of the right freely to move from State to State, a right ~~to~~ of national citizenship secured by the privileges and immunities clause of the Fourteenth Amendment;

(d) said Act arbitrarily and unreasonably discriminates between citizens of the United States, non-residents of Ohio, hindering the movement into Ohio only ofthose citizens who are poor, an invidious discrimination in violation of the ~~Fourteenthxx~~ equal protection clause of the Fourteenth Amendment;

(e) said Act unreasonably denies citizens of other states privileges and immunities accorded citizens of Ohio, contrary to Article IV, Section 2 of the Constitution;

(f) said Act arbitrarily and unreasonably ~~a~~

WHEREFORE, plaintiffs respectfully pray that:

1. The Court convene a three-judge District Court as required by Title 28, U.S.C. Secs. 2281 and 2284.

2. The Court declare Sec. _____ of _____ unconstitutional.

3. The Court grant an order temporarily restraining defendants from enforcing _____ of _____.

and any enforcement thereof unconstitutional.

4. The Court preliminarily enjoin and, after full hearing, permanently enjoin defendants from enforcing the Act----------, Secs.----------

.....

5. The Court grant such futher relief as shall be necessary and proper.

discriminated between residents of Ohio, citizens thereof, denying assistance to those not continuously resident in Ohio during the immediately preceding one year while granting assistance to all others, an invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment;

(g) public assistance, established to provide for all of the needy and distressed in Ohio, is arbitrarily and unreasonably withheld by said Act from Ohio residents not continuously resident in Ohio during the immediately preceding one year, depriving plaintiffs of due process guaranteed by the Fourteenth Amendment;.

WHEREFORE, plaintiffs respectfully pray that:

1. The Court convene a three-judge District Court as required by Title 28, U.S.C. Secs. 2281 and 2284.

3. The Court declare the Act ~~xxxxxxxx~~-----
----------(cite)
and any enforcement thereof unconstitutional.

TRO 4. The Court preliminarily enjoin and, after full hearing, permanently enjoin defendants from enforcing the Act----------, Secs.----------
.....

5. The Court grant such futher relief as shall be necessary and proper.

2. The Court grant a ~~temporary restraining~~ order temporarily restraining defendants from enforcing the Act----------
------, Secs.----------,
pending the final determination of this action.

discriminates between residents of Ohio, citizens thereof, denying assistance to those not continuously resident in Ohio during the immediately preceding one year while granting assistance to all others, an invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment;

(g) public assistance, established to provide for all of the needy and distressed in Ohio, is arbitrarily and unreasonably withheld by said Act from Ohio residents not continuously resident in Ohio during the immediately preceding one year, depriving plaintiffs of due process guaranteed by the Fourteenth Amendment;

WHEREFORE, plaintiffs respectfully pray that:

1. The Court grant an order temporarily restraining defendants from enforcing Section _____ of _____.

2. The Court convene a three-judge District Court as required by 28 U.S.C. Secs. 2281 and 2284.

3. The Court declare Section _____ of _____ _____ unconstitutional.

4. The Court preliminarily enjoin, and, after full hearing, permanently enjoin defendants from enforcing Section _____ of _____.

5. The Court grant such further relief as shall be necessary and proper.

Sending to Calif. divorce her from natural relation w/ sister.

discriminated between residents of Ohio, citizens thereof, denying assistance to those not continuously resident in Ohio during the immediately preceding one year while granting assistance to all others, an invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment;

(g) public assistance, established to provide for all of the needy and distressed in Ohio, is arbitrarily and unreasonably withtheld by said Act from Ohio residents not continuously resident in Ohio during the immediately preceding one year, depriving plaintiffs of due process guaranteed by the Fourteenth Amendment;, and taking

1967

Jan. 4—Order appointing U. S. as amicus curiae and party.

Jan. 23—Defendants' answer filed.

Nov. 8—Writ of injunction issued.

Nov. 8—Opinion of three-judge court.

Nov. 8—Decree of three-judge court.

Nov. 29—Order of Associate Justice of the Supreme Court, Hugo L. Black, granting stay, filed.

In the
United States District Court for the
Middle District of Alabama, Northern Division.

Mrs. Sylvester Smith, Individually and on Behalf of Her Minor Children, Ida Elizabeth Smith, Ernestine Smith, Willie Louis Smith and Willie James Smith and on Behalf of All Other Mothers of Needy, Dependent Children Similarly Situated, Plaintiffs, versus Ruben K. King, Commissioner of the State Department of Pensions and Security, State of Alabama; George Wallace, Chairman, State Board of Pensions and Security, State of Alabama; James Record, Mrs. Mary Waite, William M. Clarke, Temple Coley, Grant Whiddon, Mrs. Mary Ella Reaves, Members of the State Board of Pensions and Security, State of Alabama; Mrs. Clinton S. Wilkinson, Sr., Director, Dallas County Department of Pensions and Security; Individually and in Their Official Capacities, Defendants.	Civil Action. No. 2495-N.

COMPLAINT

(for declaratory judgment and injunctive relief).

(Filed Dec. 2, 1966.)

I.

1. This is a suit for injunctive relief authorized by Title 42, U.S.C., §1983 to be commenced by any citizen

of the United States or other persons within the jurisdiction thereof to redress the deprivation under color of statute, ordinance, regulation, custom or usage of the state of rights, privileges and immunities secured by the Constitution and the laws of the United States. The rights, privileges and immunities sought herein to be redressed are those secured by the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, by the Social Security Act, 42 U.S.C., §§601-609, and by §601 of the Civil Rights Act of 1964. This is also a suit for a declaratory judgment pursuant to Title 28, U.S.C., §2201 of rights established by the aforementioned constitutional and statutory provisions.

2. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C., 2281 since it seeks an injunction to restrain the Defendant officers of the State of Alabama from the enforcement, operation and execution of the state-wide regulation set forth in the Alabama Manual for Administration of Public Assistance, Part I, Chapter II, Section V (A) (entitled "Child Ineligible if There is a Father or Mother Substitute"), and commonly referred to as the "substitute father" regulation (a copy of which is attached hereto as Exhibit A), on the ground of the unconstitutionality of said regulation under the Constitution of the United States.

3. Jurisdiction is conferred on this Court by 28 U.S.C., §1343 (3) and (4) providing for original jurisdiction of this Court in suits authorized by 42 U.S.C., §1983; jurisdiction is further conferred on this Court by 28 U.S.C., §§2201 and 2202 relating to declaratory judgments and by 28 U.S.C., §§2281 and 2284 providing for a three-judge Court.

4. Plaintiff Sylvester Smith is an adult Negro citizen of the United States and Alabama and is the mother of

Plaintiff children, Ida Elizabeth Smith, age fourteen years; Ernestine Smith, age twelve years; Willie Louis Smith, age eleven years; Willie James Smith, age nine years. For several years prior to October 1, 1966, Plaintiff and her children had been recipients of financial assistance under the Aid to Dependent Children program (hereafter referred to as ADC) of the State of Alabama, a public assistance program authorized by Code of Alabama, Title 49, §17 and Title 42, U.S.C., §§601-609. By notice dated October 11, 1966, Plaintiff Smith and her children were removed retroactive to September 30, 1966 from the list of persons eligible to receive aid, on the ground of the "substitute father" regulation. A copy of said notice is attached hereto as Exhibit B. A few weeks prior to her termination from ADC, Plaintiff Smith had sent a letter to President Johnson complaining of the inadequate size of her welfare grant and of other Alabama welfare policies. Through an aide, the President forwarded the letter to responsible welfare officials.

5. Plaintiffs bring this action on their behalf and on behalf of all the other persons similarly situated pursuant to Rule 23 (a) and (b) (2) of the Federal Rules of Civil Procedure. The members of the class similarly situated are needy Negro mothers and dependent Negro children in the State of Alabama otherwise eligible for ADC in Alabama whose ADC financial assistance has been terminated or denied on the ground of the aforementioned "substitute father" regulation. The members of this class are so numerous as to make joinder impractical; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; and the representative parties fairly and adequately protect the interests of the class.

6. Defendant George Wallace is Chairman of the State Board of Pensions and Security and Defendants James

Record, Mary Waite, William M. Clarke, Temple Coley, Grant Whiddon, and Mary Ella Reavis are other members of said Board. Under Code of Alabama, Title 49, §17 (5a and 38) they are responsible, in conference with the Commissioner of the State Department of Pensions and Security, for the adoption of the policies, rules and regulations of the State Department of Pensions and Security, including the "substitute father" regulation here complained of.

Defendant Ruben K. King is Commissioner of the State Department of Pensions and Security and, as noted directly above, has statutory responsibility for the adoption of the regulations here complained of. Defendant King is also responsible, under Code of Alabama, Title 49, §17 (5a and 37), for all executive and administrative duties of said State Department and for interpreting the regulation formulated by the State Board of Pensions and Security.

Defendant (Mrs.) Clinton S. Wilkinson Sr., Director of the Dallas County Department of Pensions and Security, is responsible, under the Terms of Code of Alabama, Title 49, §17 (9 and 39), for enforcing the regulations of the State Department of Pensions and Security in the County of Dallas.

7. (a) At all times hereafter mentioned, Defendants Wallace, Record, Clarke, Waite, Coley, Whiddon, Reavis and King (and their predecessors in office), in order to receive federal funds for the ADC program of the State of Alabama, have been required by the provisions of 42 U.S.C., §§601-609 to have formulated a "state plan" for ADC consistent with the provisions of the Constitution of the United States and the provisions of 42 U.S.C., §601 et seq.

(b) Said Defendants are also, under the terms of Code of Alabama, Title 49, §17(7), required to "act as the

agent of the federal government . . . in the administration of any federal funds granted to the state to aid in the furtherance of any of the functions of the state department . . .," and to otherwise act as the agents of the federal government in the furtherance of the objectives of the ADC program.

(c) Federal funds, granted under the provisions of 42 U.S.C., §601 et seq., constitute the major share of ADC grants in the state of Alabama.

(d) Under the terms of Code of Alabama, Title 49, Section 17 (14), defendants are required to grant ADC financial assistance

> "on behalf of any needy child who is a dependent as defined in the Federal Social Security Act or amendments thereto who shall comply with the applicable requirements of this chapter, and who: (a) Has not sufficient income and resources from all sources to provide a reasonable subsistence compatible with decency and health; (b) who meets any one of the following residence requirements—(1) has resided within the state for one year immediately preceding the application for aid, or (2) was born within the state within one year immediately preceding the application for aid, or whose parent or other near relative (as defined in the Federal Social Security Act) with whom the child is living has resided in the state for one year immediately preceding the birth of said child; (c) has not directly or indirectly disposed of or deprived himself of any property for the purpose of qualifying for the benefits of this chapter; and (d) is not receiving any other type of public assistance for which federal matching is available.

Under the terms of 42 U.S.C., §606 (a) a "dependent child" means:

"a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary), a student regularly attending a school, college, or university, its equivalent, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;"

8. (a) In all respects, except for the "substitute father" regulation promulgated and enforced by Defendants, Plaintiffs and the members of their class are eligible for and entitled to ADC financial assistance.

(b) Plaintiff children Ida, Ernestine and Willie Louis, have not received parental support or care from their father, who has been dead since 1955. Plaintiff child Willie James has not received parental support or care from his father, who has been continuously absent for many years. All the children are living in the home of their mother, Plaintiff Sylvester Smith, and all are under the age of eighteen, are Alabama residents for more than one year, are not receiving any other type of public assistance, and have not directly or indirectly disposed of property for the purpose of qualifying for ADC assistance. The sole income of Plaintiff Smith and her children is in the sum of sixteen dollars ($16) per week paid to Plaintiff Smith for working as a waitress six days a week from 3:00 a. m. to 12:30 p. m. Said income is below the financial standards promulgated by Defendants as

necessary for a subsistence compatible with decency and health.

9. (a) According to information give to Plaintiff Smith by one Mrs. Stancil, an employee agent of Defendants and "counselor" of Defendants for Plaintiff Smith, the "substitute father" of the Smith children is one Mr. Willie E. Williams. Plaintiff Smith was told by Mrs. Stancil on or about October 11, 1966, that she and her children were no longer eligible for ADC aid because Mr. Williams was the "substitute father" and that Mrs. Smith should look to Mr. Williams for support. Thereafter, by notice dated October 11, 1966 and signed by Defendant Wilkinson, Plaintiffs' ADC aid was terminated on the ground of the "substitute father" regulation. (See Exhibit B attached hereto.)

(b) Mr. Willie E. Williams has nine children of his own; he lives with his family, including his wife and eight of their nine children who are dependent upon him for support. He earns barely enough for the support of his own children through work as a heavy laborer. Mr. Williams is not now, nor was he at the time of the termination of Plaintiff Smith's ADC benefits, willing or able to support the Smith family. Mr. Williams is the father of none of the children of Plaintiff Smith.

(c) Mr. Williams has known Plaintiff Smith virtually all of her life; in the last five years, he has visited her home with some frequency. He does not live in her home. Plaintiff Sylvester Smith is not willing to discuss whether she engages in a sexual relationship with Mr. Williams.

10. Upon information and belief, the Defendants have applied their "substitute parent" regulations so as to disqualify from ADC benefits only or virtually only Negro mothers and children and not white mothers and children.

11. By promulgating, adopting and enforcing the "substitute father" regulation, and on ground of said regulation terminating and denying ADC financial assistance to Plaintiff Smith, her minor children, and all other members of her class, Defendants acting under color of State law, have unlawfully deprived Plaintiff Smith and the other members of her class of ADC financial assistance, and their constitutional rights to equal protection and due process of law, and their rights under 42 U.S.C., §§601-609 and Code of Alabama, Title 49, §17, in the following manner;

A. Defendants have deprived Plaintiff's needy and dependent children, and the needy and dependent children of all others similarly situated, of the equal protection of the ADC law by classifying them as ineligible for ADC on a thoroughly arbitrary and irrational basis, i.e., the alleged sexual relation of their mother with a man who is not their father, who owes no duty of support, is giving no support, who is not married to their mother and who is not living with them.

B. Defendants have deprived Plaintiff's needy and dependent children, and the needy and dependent children of all others similarly situated, of due process of law in that Defendants have denied them needed ADC benefits to which they are otherwise entitled by arbitrarily imposing the label "substitute father" on persons who are not their fathers, owe no duty of fatherhood to them, and are performing no duty of fathers to them.

C. Defendants have deprived Plaintiff's needy and dependent children, and the needy and dependent children of all others similarly situated, of due process of law in that Defendants have denied them needed ADC benefits on the basis of a vague and uncertain regulation which enables Defendants to pick and choose on an arbitrary and whimsical basis, those to whom ADC benefits shall

be granted. The vagueness of the regulation permits Defendants to terminate aid, if they choose, in the event a recipient complains to federal authorities of their other policies, as Plaintiff Smith did.

D. Defendants have deprived Plaintiff's needy and dependent children, and the needy and dependent children of all others similarly situated of the equal protection of the laws in that the Defendants have applied the "substitute father" regulation in such a manner as to disqualify Negro applicants and recipients but not white applicants and recipients.

E. Defendants have deprived Plaintiff Smith and other mothers similarly situated of their right to privacy under the due process clause of the Fourteenth Amendment by, *inter alia,* placing upon Plaintiff Smith and other mothers, under the terms of the "substitute father" regulation, the burden of proving that they are not engaging in a sexual relation with a man through such means as "references" from their "ministers, neighbors, grocers".

F. Defendants, through the "substitute father" regulation, have deprived the needy dependent children of Plaintiff Smith and other mothers similarly situated of the ADC benefits to which they are clearly entitled under the express provisions of 42 U.S.C., §§601-609 and Code of Alabama, Title 49, §17.

12. Plaintiffs and the class which they represent have suffered damage to their health and well-being, the health and well-being of their children and their family life, and will continue to suffer severe and irreparable injury because of the aforesaid regulation complained of herein until said regulation is declared illegal and unconstitutional and is enjoined by this Court. No adequate administrative remedy or adequate remedy at law is available to plaintiffs.

Wherefore, plaintiffs on behalf of themselves and all others similarly situated respectfully pray:

1. That a three-judge Court be convened to determine this controversy pursuant to 28 U.S.C., §2281;

2. That this Court enter a declaratory judgment pursuant to 28 U.S.C., §2201, declaring "the substitute father" regulation of the Alabama State Board of Pensions and Security, specifically Part I, Chapter II, Subdivision V (A) of the Alabama Manual of Public Assistance Administration, void and of no effect insofar as it denies eligibility to Plaintiffs and members of their class on the ground that they have a "substitute father" as therein defined; and further declaring that said regulation is contrary to the intent of Congress in enacting the Aid for Families of Dependent Children provisions of the Social Security Act (42 U.S.C., §§601-609) and the intent of the legislature of Alabama in enacting the Aid to Dependent Children program in the Code of Alabama, Title 49, Section 17; and further declaring that said regulation is repugnant to the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States; and further declaring that Defendants are required to consider the eligibility for Aid to Dependent Children of Plaintiffs and all others similarly situated without reference to said "substitute father" regulation.

3. That this Court enter a permanent injunction restraining each defendant, their successors in office, agents and employees from enforcing the "substitute father" regulation contained in Part I, Chapter 2, Sub-Division V(A) of the Manual of Public Assistance Administration, and ordering them to consider eligibility for Aid to Dependent Children of Plaintiffs and all others similarly situated without regard to said regulation, on the ground that said regulation violates the intent of Congress in en-

MOTION FOR A PRELIMINARY INJUNCTION.

(Caption Omitted.)

(Filed Dec. 16, 1966.)

Please take notice that upon the Complaint herein, Plaintiffs will move the *three-judge Court* to be convened in this case at a date and time to be determined by the Court for an Order granting Plaintiffs a Preliminary Injunction

> restoring Plaintiff SMITH and her minor children to the Aid to Dependent Children program of the State of Alabama and restraining Defendants from denying eligibility to all others similarly situated on the ground of the aforesaid "substitute father" regulation,

and for such other and further relief as may seem just and proper.

Dated: December 16, 1966.

/s/ CHARLES S. CONLEY,
315 South Bainbridge Street,
Montgomery, Alabama,

DONALD A. JELINEK,
Lawyers Constitutional Defense Committee,
31½ Franklin Street,
Selma, Albama,

ALVIN J. BRONSTEIN,
Lawyers Constitutional Defense Committee,
603 North Farish Street,
Jackson, Mississippi,

Attorneys for Plaintiffs.

Williams, Adeline - TRUST FUND, 1967 - 1967

Box 44
Folder 6

of Wisconsin

Please Retain Original Order

La Casa
852
7260

South Brooklyn-Colony House Pre-School & Parent Opportunity Center

297 DEAN STREET

BROOKLYN, N. Y. 11217

Telephone: TRiangle 5-7053

Ramon ~~La Casa~~
167 Columbia St
852-4614

January 25th, 1967.

Re: Williams, Adeline
44 Columbia Place,
Brooklyn, N.Y. 11201

Mr. Carl Rechlin, Legal Director,
S. E. D. F. for Racial Equality,
150 Nassau Street,
New York, N.Y. 10038.

Heart attack

Dear Mr. Rechlin:

This is to introduce Mrs. Williams;

As explained in our telephone conversation, Mrs. Williams desires to set up a trust fund for her children. Social Security has recognized the children's claim to the death benefits of Mr. Williams. To date, the amount that Social Security has sent or will send is approximately $2890.00

The Department of Welfare, because Mrs. Williams receives public assistance, wishes to have an account of the monies and what plans she has for it. It is the feeling of Mrs. Williams that the monies should be put in trust for the children and used for their benefit.

We hope that your agency will be of assistance in setting up this needed trust fund. It is most important that the monies be assured for the children.

Thank you for the consideration you will give this request.

Please feel free in contacting us for any further aide.

Very truly yours,

Ramon Regueira

Ramon Regueira
Parent Community Worker.

Call backes soon as lawyer is gotten

RR/MB

[1967]

WHEREAS, ADELINE WILLIAMS, is the Mother of five children, namely, Donna Marie, nine years of age;Lucille Ann, seven years of age;Paula Valerie, six years of age;Crystal, five years of age; and Gordon, three years of age, she resides with said children at 44 Columbia Place, Brooklyn, New York, and

WHEREAS, the husband of said ADELINE WILLIAMS, WILLIAMS, died recently and as a result of that death, the said ADELINE WILLIAMS and as a settlement thereon, has received from the United States Department of Health, Education and Welfare as Social Security benefits, for the aforesaid five children in amount of Two Thousand Seven Hundred Eight Dollars and seventy-five cents, ($2,708.75).

WHEREAS, said ADELINE WILLIAMS is desirious of establishing a trust for the benefit of the said five children, which trust shall be used for said children only in event of emergency or for their college educations,or that of any one or more of them in the event that any sums are remaining thereto at such time.

Accordingly, this agreement made and entered March, 1967, between ADELINE WILLIAMS as Grantor and ADELINE WILLIAMS as Trustee provides as follows,

1. The said sum referred to above presently on deposit with the Greater New York Savings Bank, Branch No. 7, Account No. 162500-3,

shall be divided into five equal parts, one for each of the five children above named, namely Donna Marie Williams, Lucille Ann Williams, Paula Valerie Williams, Crystal Williams and Gordon Williams.

2. This sum shall be kept in the Greater New York Savings Bank or in any other savings bank in the city where said ADELINE WILLIAMS and the said children reside, which bank shall be a bank where the deposits are guaranteed by the Federal Deposit Insurance Corporation.

3. Said fund referred to in the previous paragraph shall accumulate interest and shall not be used under any circumstances by the Trustee except for the following purposes.

A) In event of serious illness by any of the aforesaid five children, the Trustee shall have the right to use part for any such child seriously ill, when said ADELINE WILLIAMS has no resources of her own to use for such purposes or is not eligible through any federal state, city or private medical program for such service.

B) In the event at the time hereafter any of the children are eligible to attend college and any one or more of the aforesaid five children desire to go to college, the Trustee herein named shall have the right to use such money for college and/or professional education for such child.

C) If at the time any one of these children reach the age of twenty-one and such child is not then attending college, the Trustee herein shall deliver such balance of the amount held in trust for

for such child together with any accumulated interest to said child.

4. The said ADELINE WILLIAMS Trustee herein named shall keep detailed records of all items spent for any child in separate records for each.

5. In the event that any of the above five children shall die leaving no issue surviving him or her and for whom there is money still held in trust pursuant to the above undertakings, such money so held in trust for said deceased child shall be distributed equally to the other four surviving children. In the event such child shall leave issue surviving him or her, such issue shall take such amount as the parent would have taken should he or she survived, per stirpes and not per capita.

6. The powers enumerated in this agreement and those conferred upon the Trustee by law, shall not be construed to enable any person or entity to purchase, exchange or otherwise deal with or dispose of the capital or income of this trust for less than adequate or full consideration in money or monies worth. Neither shall any power be construed to allow for any person or entity to borrow any part of the principal or income without adequate security or without paying a rate of interest commensurate with that charged by a lending institution. No person or entity other than the Trustee shall have the power to control the investment of the trust property.

7. No beneficiary of this trust shall have the right to alienate encumber or hypothecate his interest in the trust or income of this trust except as here and otherwise provided, nor should any benefici-

ary's interest be subject to the claims of his creditors or liable to attachment, execution or other process of law.

8. At any time hereafter, additional sums may be added to the corpus of the trust, either for all beneficiaries herein named or for any one of them, and all the provisions herein above set forth shall be fully applicable to any such sum added at anytime hereafter.

9. This trust shall be irrevocable and the grantor expressly waives all rights and power alone, jointly or in conjunction with others to alter, ammend, or revoke or terminate this trust or any of its terms in whole or part.

10. The said ADELINE WILLIAMS is hereby designated as the trustee herein and accepts such designation and agrees to perform all her duties herein as limited by the forms of this trust agreement and by law.

11. This trust shall be governed by the laws of the State of New York, or at all times.

In witness whereof, the Grantor hereunto set her hand and Seal and the Trustee accord this day of 1967.

_____

_____

_____

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LINDA WILLIAMS and JUNIUS GARY and JEANETTE GARY, his wife, individually and on behalf of their minor children and all other parents, relatives or minor children similarly situated, Plaintiffs,	:	
vs.	:	CIVIL ACTION NO. 19250
EDMUND P. DANDRIDGE, JR., Chairman of the Maryland State Board of Public Welfare; RALEIGH C. HOBSON, Director, State Department of Public Welfare, CALHOUN BOND, MRS. RALPH O. DULANY, DR. W. RICHARD FERGUSON, MRS. CHARLES D. HARRIS, and J. O. SHUGER, Members of the Maryland State Board of Public Welfare, ESTHER LAZARUS, Director of Public Welfare for the City of Baltimore, individually and in their official capacities, Defendants.	:	

* * * * *

Filed: February 25, 1969

Before WINTER, Circuit Judge, THOMSEN, Chief Judge, United States District Court, and HARVEY, District Judge.

- SUPPLEMENTAL OPINION ON MOTION -

WINTER, Circuit Judge:

After the filing of our opinion in this case, defendants filed a multi-faceted motion, purportedly under Rules 52(b) and 59, Fed. R. Civ. P., in which they ask, alternatively, that we amend our findings of fact and judgment, grant a new trial, or receive additional evidence and alter or amend the judgment. Basically, the new or additional facts that defendants want us to consider are not in the nature of newly-discovered evidence, and no valid excuse is offered as to why so tardily they are brought to our attention.[1] Some of the most important arguments and facts are developed for the first time in defendants' reply brief on the motion. While this untimeliness does not detract from their significance, counsel should understand that the way they have pursued this litigation brings no credit upon them. Understandably, plaintiffs vigorously question defendants' right to proceed, and they cite persuasive authority in support of their position.

The case is an important one. We are now told that twenty-seven states have maximum grant regulations similar to that of Maryland; other litigation questioning their validity is pending in other courts. In an effort to arrive at a cor-

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1. The facts, themselves, are not in dispute. They were stipulated to be true in open court at the hearing on the motion; others were the subject of a post-hearing written stipulation.

rect decision, we should give full and complete consideration to all relevant materials. We prefer, therefore, to deal with the motion on its facts and the merits of the contentions it presents, without deciding, however, the propriety, under the rules or otherwise, of how defendants have proceeded or conducted the litigation.

As will appear from what is said hereafter, the motion is granted in part and denied in part.

- I -

In regard to the question of the proper construction to be placed on the Social Security Act of 1935, as amended, and whether the Maryland maximum grant regulation conflicts therewith, defendants point out that Maryland has had a maximum grant regulation in some form continuously since January 1, 1947. It is asserted that the Secretary of Health, Education and Welfare (HEW) has "approved" the Maryland regulation, as well as its counterpart in some twenty-seven other states, and that this "approval" is entitled to great weight, if, indeed, it is not conclusive, in deciding whether the regulation conflicts with any provision of the Act. The text of the maximum grant regulations in other states is not before us; nor is any evidence of how they are applied. Finally, it is contended that the legislative history of clause 9 of § 402[2]

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2. Clause 9 is the portion of § 402, 42 U.S.C.A. § 602, which requires that a State AFDC plan <u>must</u> include a provision:

"(9) * * * effective July 1, 1951, that all individuals wishing to make application for aid to

indicates that it has a more restrictive meaning than the one we ascribed to it, so that there is no conflict between it and the regulation.

We accept the correction that the Maryland maximum grant regulation is not new and that it has its counterpart elsewhere. We find that HEW has never expressly disapproved the regulation; whether it has approved it is another matter, as is the legal effect of what has been done. We state first, drawing on the parties' stipulation, what HEW has and has not done.

HEW has at no time issued any regulations dealing specifically with the problem of maximum grant regulations, nor has it circulated any reasoned decisions or statements detailing its position. Indeed, there is no indication whatever that any of the arguments urged in this proceeding or adopted in our previous opinion have been presented to HEW. The sole contacts which HEW has had with the regulation in issue, so far as we are informed by the parties, are as follows: (1) at various times HEW has "incorporated" revisions of the maximum grant regulation into Maryland's previously approved AFDC plan; (2) HEW issued, in October, 1962, a booklet entitled "State Maximums and Other Methods of Limiting

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2. (continued)

> families with dependent children shall have the opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals * * * ."

Since the 1968 amendments, clause 9 has become clause 10 of § 402.

Money Payments to Recipients," which details, inter alia, the AFDC maximum grants in the respective states employing such regulations; (3) an Interim Policy Statement of May 31, 1968, specifies that a state AFDC plan must provide by July 1, 1969, for increases in any maximum grants in order to reflect changes in living costs.

From the foregoing, we distill the obvious, namely, that HEW implicitly considers maximum grant regulations not to be violative of the Act. In view of the fact, however, that there is no indication from administrative decision, promulgated regulation, or departmental statement that the question of the conformity of maximum grants to the Act has been given considered treatment,[3] we believe that the various actions and inactions on the part of HEW are not entitled to substantial, much less to decisive, weight in our consideration of the instant case.

In adopting this view, we cast no doubt whatsoever upon the general doctrine that the views of administrative agencies entrusted with the administration of a statute are to be given due deference when issues of statutory interpretation arise. See, generally, Annot., Administrative or Practical Construction of Statute as Precedent for Judicial Construction, 84 L.Ed. 28 (1939). Nevertheless, whether admin-

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3. Some corroboration for this statement is found in the implicit assumption in the discussion of maximum family grants, Note, Welfare's "Condition X," 76 Yale L. J. 1222, 1232-33 (1967).

istrative interpretation in the abstract is deemed to be "pertinent," to have "weight," to have "persuasive weight," or to be of such significance that it "ought not to be overruled without cogent reasons," Anderson v. McKay, 211 F.2d 798, 805 (D.C. Cir.), cert. den., 348 U. S. 836 (1954), the attitudes, practices and interpretations of an administrative agency are certainly not absolute rules of law but, at best, merely "helpful guides to aid courts in their task of statutory construction." Sims v. United States, 252 F.2d 434, 438 (4 Cir. 1958), aff'd., 359 U. S. 108 (1959). The ultimate authorities on issues of statutory interpretations are the courts, Volkswagenwerk v. FMC, 390 U. S. 261, 272 (1968), which have the final responsibility to declare what a statute means. Fishgold v. Sullivan Drydock & Repair Corp., 154 F.2d 785, 790 (2 Cir.)(L. Hand, J.), aff'd., 328 U. S. 275 (1946). To the same effect, see, e. g., Folsom v. Pearsall, 245 F.2d 562, 564-65 (9 Cir. 1957); Commissioner v. Winslow, 113 F.2d 418, 423 (1 Cir. 1940). Where a conflict arises between the administrative and judicial constructions of a statute, the latter will necessarily prevail. Deeg v. Lumbermen's Mut. Cas. Co., 279 F.2d 491, 494 (10 Cir. 1960); Cory Corp. v. Sauber, 266 F.2d 58, 61 (7 Cir. 1959), rev'd. on other grounds, 363 U. S. 709 (1960); Louisiana Pub. Serv. Comm'n. v. SEC, 235 F.2d 167, 172 (5 Cir. 1956), rev'd. on other grounds, 353 U. S. 368 (1957); Woods v. Benson Hotel Corp., 177 F.2d 543, 546 (8 Cir. 1949). See, 1 Davis, Administrative Law Treatise, § 5.06, at 326-328 (1958). In determining the

proper weight to be accorded to an administrative decision, account must be taken of the consistency of the agency's interpretation with the underlying purposes of the statute which is being construed. P. Lorillard Co. v. FTC, 267 F.2d 439, 443 (3 Cir.), cert. den., 361 U. S. 923 (1959). In no event is a court "compelled to follow an administrative interpretation that it regards as inconsistent with the legislative purpose of the provision in issue." In re Petition of Chin Thloot Har Wong, 224 F. S. 155, 165 (S.D. N.Y. 1963).

Furthermore, it is clear that the thoroughness with which an administrative agency has dealt with a particular problem of statutory construction is a highly relevant factor in determining the weight to be assigned to the agency's resolution of the matter. Such weight will be dependent upon "the thoroughness evident in * * * [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U. S. 134, 140 (1944). If the agency's construction has resulted from an uncontested non-adversary proceeding, it has been said that the agency's interpretation is entitled to "relatively little weight." SEC v. Sterling Precision Corp., 393 F.2d 214, 220 (2 Cir. 1968). See, Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275, 290 (1946). Finally, to the argument that Congress has not stepped in to alter or amend HEW's apparent interpretation that Maryland's maximum grant regulation con-

forms to the Act, we are reminded of our Court of Appeals' admonition that "courts are properly chary of equating mere inaction with approval, in the absence of a solid foundation for the inference of conscious ratification [by Congress]." Duncan v. Railroad Retirement Bd., 375 F.2d 915, 919 (4 Cir. 1967).

If the unequivocal command that "aid * * * shall be furnished with reasonable promptness to all eligible individuals," were all that we must consider, we would not be disposed, in the light of the legal principles which we have set forth and of the limited nature of the administrative action taken by HEW in regard to maximum grant regulations, to assign controlling significance to HEW's apparent views. To the extent that these views hold that maximum grant regulations are consistent with the language and purposes of the Act, we would decline to follow them. See, King v. Smith, 392 U. S. 309, 333, n. 34 (1968).

We turn to the argument that the legislative history of clause 9 demonstrates that it has a more restricted meaning than we have given it. Essentially, defendants' argument is that the portion of the Social Security Act Amendments of 1950, 64 Stat. 549, which added clause 9, on which we placed principal reliance in concluding that there was a conflict between the regulations and the Act, was addressed to a practice in Maryland and in other states of dealing with revenue crises in AFDC by instituting a freeze on the receipt of new AFDC applications, rather than to devise some other uniform

or equitable way of reducing AFDC expenditures. The requirement of clause 9 - "that all individuals wishing to make application for aid to families with dependent children shall have the opportunity to do so" - was, so the argument runs, specifically directed to this practice. The "all eligible individuals" to whom aid must be furnished, the argument continues, are the applicants for aid referred to in the beginning of clause 9, and not the family members benefited by the application.

We reject defendants' second argument for the reasons set forth in footnote 9 of our original opinion. Although clause 9 may contemplate that the application for aid be made by a responsible adult, child-care institution, child-placement or child-care agency, it requires that the amount of aid granted be commensurate with the needs of all of those on behalf of whom an application is made. Defendants' argument is essentially that the command of the entire clause is met if the applicant, i. e., the responsible adult, is furnished some aid, even though the amount is less than that which the state has determined is the extent of need and appropriate benefit for the members of his family. If his needs as an individual are satisfied in whole or in part, the clause requires no more. The basic purpose of AFDC to provide support for "dependent children" makes the hollowness of this argument manifest.

We see nothing inconsistent between the claimed legislative intent as expressed in clause 9 and the literal meaning we have given it. If the evil to be corrected was

the states' freezing consideration of new applications for aid, it would not be unreasonable for Congress to say that the application should be received, and considered, and that the amount of aid should be granted promptly to all who were eligible, lest some state devise some other subterfuge, such as receiving an application and considering it but postponing any benefits thereon or granting less than the benefits indicated thereon until it was financially more convenient to do so.

More importantly, closer scrutiny of the legislative materials relevant to the purposes of clause 9 satisfies us that we have not expanded its meaning beyond the initial legislative intent in its enactment. The basic purpose of clause 9 was explained in the report of the House of Representatives where the bill, H. R. 6000, which added clause 9, originated.[4] H. R. 6000 was not reported by the Senate until

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4. The pertinent sections of the report read:

> "D. Opportunity to apply for and receive assistance promptly
>
> Shortage of funds in aid to dependent children has sometimes, as in old-age assistance, resulted in a decision not to take more applications or to keep eligible families on waiting lists until enough recipients could be removed from the assistance rolls to make a place for them. As noted in the discussion of this problem in the section on old-age assistance, this difference in treatment accorded to eligible people results in undue hardship on needy persons and is inappropriate in a program financed from Federal funds. The requirement that State plans must provide opportunity to apply to all persons wishing to do so and that assistance shall be furnished promptly to all eligible families is included in the proposed amendments to title IV of the Social Security Act."

the following session, and, while the House version required a state to furnish aid "promptly," clause 9 was amended in the Senate to require a state to furnish aid "with reasonable promptness." This substitution in phraseology was thought to assure that a state would have sufficient time to make investigations. It was the only amendment; otherwise, the Senate sought to achieve the same objectives as the House.[5] It should be stressed that H. R. 6000 also

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4. (continued)

* * * * *

"Requirement relating to opportunity to apply for assistance and receive it promptly

The provisions of section 3(a) of the Social Security Act are also amended by the bill by the addition of a new clause (9). This clause would add a specific requirement designed to make it clear that a State plan, in order to be approved, must provide that all individuals wishing to make application for assistance shall have an opportunity to do so and that assistance shall be furnished promptly to all eligible individuals. This new requirement would take effect July 1, 1951."

H. R. Rep. No. 1300, 81st Cong., 1st Sess., pp. 48, 148 (1949).

5. "TITLE III-AMENDMENTS TO PUBLIC ASSISTANCE AND MATERNAL AND CHILD WELFARE PROVISIONS OF THE SOCIAL SECURITY ACT

REQUIREMENTS OF STATE PLANS

* * *

Requirements relating to opportunity to apply for and receive assistance

The provisions of section 3(a) of the Social Security Act are also amended by the bill by the addition of a new clause (9). This clause would add a specific requirement designed to make it clear that a State plan, in order to be approved, must provide that all individuals wishing

expanded AFDC (which was theretofore a program solely of aid to children) to include the relative with whom any dependent child is living. The purpose of the expansion was described in the report of the House Committee.[6] The essential emphasis,

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5. (continued)

to make application for assistance shall have an opportunity to do so and that assistance shall be furnished with reasonable promptness to all eligible individuals. This new requirement would take effect July 1, 1951.

The same addition has been made by sections 321 and 341 of the bill to sections 402(a) and 1002(a), respectively, of the Social Security Act, although in the latter case the new clause is numbered (11).

These amendments proposed by the bill are the same in substance as those proposed on the same subject by the bill as passed by the House except that the latter would have required the assistance to be furnished 'promptly' instead of 'with reasonable promptness' as proposed by your committee. The change was made in order to assure the States reasonable time to make investigations and complete any other action necessary to determine eligibility and extent of need for assistance."

S. Rep. No. 1669, 81st Cong., 2nd Sess.; 2 U. S. Code Cong. Ser. 3470-71 (1950).

6. "XIV. AID TO DEPENDENT CHILDREN

* * *

"A. Inclusion of mother or other relative caring for child

In the present law, aid to dependent children is defined as payments with respect to a dependent child. No specific provision is made for the need of the parent or other relative with whom the child is living. Particularly in families with small children, it is necessary for the mother or another adult to be in the home full time to provide proper care and supervision. Since the person caring for the child must have food, clothing, and other essentials, amounts allotted to the children must be used in part for this purpose if

in this statement, on the needs of the dependent children, and the concept that aid to the relative with whom the children were living was necessary so as not to diminish the realizable benefit to the children belies the interpretation of clause 9 pressed by defendants.

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6. (continued)

> no other provision is made to meet her needs. The maximum monthly amount of assistance in which the Federal Government will now share is $27 for one child in a family and $18 for each child beyond the first.
>
> Because of the lack of specific provision for Federal participation in assistance to the mother or other relative and the inadequacy of the $27 and $18 maximums to cover the cost of essentials for the children and an adult as well, States have been forced to make a very large proportion of payments larger than the maximum amounts subject to Federal sharing. In December 1948 about one-half of all payments were above the maximums. More than three-fourths of all payments exceeded these amounts in 24 States. Often States have been unable to make payments that were at all realistically related to the need of the dependent children and the relative caring for them.
>
> To correct the present anomalous situation wherein no provision is made for the adult relative and to enable States to make payments that are more nearly adequate, the bill would include the relative with whom the dependent child is living as a recipient for Federal matching purposes. The maximum amount of assistance for a relative in which the Federal Government would share would be $27. The maximums of $27 for one child in a family, and $18 for each additional child, would remain unchanged. Thus, for a relative and one dependent child the maximum amount of the payment subject to Federal sharing would be $54 instead of $27. For a three-child family, the maximum would be $90 instead of $63."

H. R. Rep. No. 1300, 81st Cong., 1st Sess., pp. 45-46 (1949).

Inexplicably, however, Congress, in the Social Security Amendments of 1967, P. L. 90-248, 81 Stat. 821, amended § 402 of the Act in a manner which may have a substantial effect on the apparent conflict between the regulation and the Act. The record, however, is insufficient for us to express any final conclusion.

The amendment, contained in § 213(b) of the Act, cited as Social Security Amendments of 1967, added a new clause to § 402(a), to be known as clause 23, which requires, as an additional condition, that a state AFDC plan must:

> "provide by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, <u>and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted</u>." (emphasis supplied.)

Section 213(a) amended various other sections of the original Act to provide that recipients under various programs need not suffer a reduction in benefits if they had income up to $7.50 per month, instead of the previous ceiling of $5.00 per month, i. e., 42 U.S.C.A. §§ 302(a)(1)(A)(i) [state old-age and medical assistance plans], § 1202(a)(8)(C) [state plans for aid to blind], § 1352(a)(8)(A) [state plans for the permanently and totally disabled], and § 1384(a)(14)(D) [state plans for aid to aged, blind or disabled or for such aid and medical assistance for aged].

Section 213 of the amending Act was added to the House Bill by amendment in the Senate, later concurred in by

the House.[7] As it shows on its face, § 213(b) was designed to increase benefits to keep pace with increased living costs. The references to it in the committee reports are no more informative.[8] Elsewhere in the extensive amendments to the

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7. See discussion in Conference Report No. 1030, 90th Cong., 1st Sess., 2 U. S. Code Cong. Ser. 3179, 3208 (1967).

8. Clause 23 was added by § 213(b) of the amending Act. As passed by the Senate, the amending Act added clause 23 by § 213(a) and referred to clause 23 as clause 24. In the Senate Report, the following was said:

> "Paragraph (5) of section 213(a) of the bill amends section 402(a) of the Act by adding (after the new clause (23) added to such sec. 402(a) of the act by sec. 211(a) of the bill) a new clause (24) which requires a State plan for the dependent children program to provide that by July 1, 1969, and at least annually thereafter, the amounts used by the State to determine the needs of individuals will be adjusted to reflect fully changes in living costs since such amounts were established, and that any maximums that the State imposes on the amount of aid paid to families will be proportionately adjusted."

Senate Report No. 744, 90th Cong., 1st Sess., 2 U. S. Code Cong. Ser. § 133 (1967).

The Conference Report which recommended concurrence in the Senate amendment contained no discussion of its purpose or need, beyond the barest description of its terms. Conference Report No. 1030, 90th Cong., 1st Sess., 2 U. S. Code Cong. Ser. § 209 (1967).

original Act, benefits were increased generally,[9] the conditions attaching to AFDC benefits were liberalized to encourage AFDC recipients to make the transition to becoming self-supporting, and new protections to children in AFDC families and provisions to make more certain the fulfillment of parental responsibilities were added.[10]

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9. See, e. g., Senate Report No. 744, 90th Cong., 1st Sess., 2 U. S. Code Cong. Ser. 2834, 2835 [old-age, survivors, and disability insurance], 2836 [health insurance], 2838 [public assistance].

10. Senate Report No. 744, op. cit. n. 8. At p. 2837, the general program in this report was thus summarized:

"AID TO FAMILIES WITH DEPENDENT CHILDREN

The bill would make the following reforms in the aid to families with dependent children programs:

(1) For the purpose of providing greater incentives for appropriate members of families drawing aid to families with dependent children (AFDC) payments to obtain employment so that they need no longer be dependent on the welfare rolls the bill would--

(a) exempt a portion of earned income for members of the family who can work;

(b) establish a new work incentive and training program for individuals to be administered by the Department of Labor upon referral by the State welfare agency;

(c) require State welfare agencies to assure adequate child care arrangements for the children of working mothers;

(d) require the State welfare agencies to establish a social service plan for each AFDC family; and

(e) modify the optional unemployed fathers program to provide for a uniform definition of unemployment throughout the United States.

In order to enable the States to implement these requirements, the Federal Government would supply Federal matching for services (including child welfare and day care) which the States would be

In the context in which clause 23 was added, that is to say, having regard to the overall amendments to the

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10. (continued)

required to furnish. Federal matching would also be provided for training, supervision, materials, and other items and services needed in the work incentive program."

The provisions of existing law and proposed changes to liberalize the earnings exemptions of dependent children are described at p. 2861.

The overall changes in the AFDC program are summarized at pp. 2982-83, as follows:

"The plan which the committee has developed, with the advice and help of the Department of Health, Education, and Welfare and the Department of Labor, amounts to a new direction for AFDC legislation. It follows that the basic outline of the bill passed by the House but incorporates certain desirable changes in the method of administration and program emphasis. The committee is recommending the enactment of a series of amendments to carry out its intent of reducing the AFDC rolls by restoring more families to employment and self-reliance.

The first series of amendments is designed to encourage and make possible the employment of adults in AFDC families. Three provisions are aimed at this purpose:

(1) the establishment of a work incentive program under the Deparment of Labor for the purpose of restoring members of AFDC families (including those with little or no work experience) to regular employment through counseling, placement services and training, and arranging for all others to get paid employment in special work projects to improve the communities in which they live;

(2) A requirement that all States furnish day-care services and other social services to make it possible for adult members of the family to take advantage of the work and training opportunities under the work incentive program; and

(3) A requirement that all States exempt part of the AFDC recipient's earnings to provide incentives for work in regular employment.

AFDC program made by the amending Act, we find it difficult to say that § 213(b) represented a considered judgment by

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10. (continued)

The second series of amendments would set up new protections for the children in AFDC families and would make more certain the fulfillment of parental responsibilities:

(1) A requirement that the States establish a comprehensive plan of social services for each AFDC child to assure the child the maximum opportunity to become a productive and useful citizen;

(2) A requirement that State welfare agencies refer cases of child abuse or neblect to appropriate law-enforcement agencies and courts;

(3) A requirement that protective payments and vendor payments be made where appropriate to protect the welfare of the children;

(4) Federal payments for additional foster care situations under the AFDC program;

(5) A requirement to assure that fathers who desert or abandon their families will contribute to the support of their families by using available tax records and the enforcement power of the Internal Revenue Service. In addition, there would be a requirement that the States establish separate units to enforce the child-support laws, including financial help to the courts and prosecuting agencies to enforce court orders for support; and

(6) A program of emergency assistance to families with minor children for a temporary period.

(7) A more definitive and uniform program for the children of unemployed fathers.

The third series of amendments would make other changes in the program designed to deal with the expanding AFDC rolls.

(1) A requirement that all States establish programs to reduce the number of children born out of wedlock; and

(2) A requirement that all States offer family planning services to appropriate AFDC recipients."

Congress that it wished to validate all maximum grant regulations and that it wished to depart from the basic objectives of prior Congresses, reaffirmed by it, that benefits under AFDC be granted to all eligible individuals and that to the maximum extent feasible for their interests dependent children be kept in their own family units.[11] The brevity of the discussion of § 213(b) in the legislative reports, as compared to the considered treatment of other amendments, leads to the reasonable assumption that Congress gave no real thought to the effect of maximum grant regulations in its oft-expressed basic legislative purposes, but simply concluded that if it was increasing benefits generally it should include a direction that maximum grants should be increased, also. Yet, clause 23 is unmistakable recognition by Congress that some states have maximum grant regulations, and, utilizing accepted canons of statutory construction, we are bound to give effect to this recognition.

The problem is what is the scope of Congressional recognition and implied approval of maximum grant regulations.

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11. As part of the amending Act, Congress also amended § 401, 42 U.S.C.A. § 601, in a technical respect not itself significant here. What is significant is that an amendment was made to the section containing the recital that a purpose of AFDC was "to help maintain and strengthen family life" without any alteration thereof. Presumably, family life is strengthened and maintained by holding a family together. Yet, as has been previously shown, the Maryland maximum grant regulation in its operation encourages the very opposite.

The language of Congress in clause 23 is general and the Congressional intent expressed therein is uncertain. Manifestly, it cannot validate that which the Constitution does not permit. Equally important, it must be construed in the light of all other provisions of the Social Security Act, as amended, so as to achieve an harmonious whole. Even if clause 23 is treated as an implied amendment of clause 9, we do not know, and the parties have offered no proof to show us, what are the terms and provisions of the maximum grant regulations of other states and how they are applied. To be specific, we do not know if they are similar and are uniformly applied like that of Maryland to encourage the disbanding of large families so that Congressional recognition may be deemed an amendment of § 402 of the Act, as well as a departure from the original legislative intent of clause 9 and the underlying purposes of the AFDC program to strengthen family life.

In short, clause 23 may well be properly construed to imply recognition by Congress of the concept of maximum grant regulations in the abstract without the additional implication that a congressional imprimatur has been placed upon every conceivable maximum grant regulation, no matter what its operative effects may be in furthering or retarding basic congressional policy. Thus, while Congress has indicated its view that a maximum grant regulation is not per se in conflict with the Act, prior to the 1967 amendments, as we have construed it, we cannot, on the present record, impute to Congress the intention to endorse specifically the Maryland

regulation with its pernicious results, absent a statement of endorsement or circumstances of endorsement which speak with unmistakable clarity. In other circumstances, we would direct the parties to present additional proof to enable us to resolve this issue. We do not find this necessary in the instant case, however, because we are still satisfied that the regulation cannot hurdle the constitutional barrier of the equal protection clause.

- II -

In regard to the question of whether Maryland's maximum grant regulation denies equal protection of the law, the evidence before us at the original trial was crystal-clear that the only reason why the maximum grant regulation was continued was financial, i. e., that the Governor and General Assembly of Maryland had failed to appropriate sufficient funds to finance the cost of AFDC, absent the operative effect of the maximum grant regulation in reducing expenditures. Now defendants assert that, at least initially, the maximum grant regulation was rationally supportable for constitutional purposes on the basis of the so-called "principle of less benefit." The thrust of the principle in the case at bar is that public assistance or welfare programs should not serve as an inducement to individuals to abandon useful employment, or to decline useful employment, or to abandon their families and the obligation to support them. Accordingly, the benefits derivable from such assistance should, in no event, be greater than the remuneration which could be achieved from gainful

employment. In order to achieve this result, so the argument runs, the maximum grant is keyed to the minimum wage, so that an individual family receiving assistance would obtain no more than a family in which one member thereof was employed at the minimum wage level.

Specifically, under the principle of "less benefit," defendants assert that the maximum grant regulation serves a rational function in that it (a) discourages desertion of children by the wage earner or the wage earners of the family, (b) it provides an inducement to a surviving parent to seek employment, and (c) it encourages parents to limit the sizes of their families.

Even if we assume that the maximum grant regulation was adopted for the purposes that defendants assert,[12] and even if we accept the contention that the validity of the regulation under the equal protection clause may be saved by the original purposes for its promulgation, notwithstanding that those are not the purposes for its continuance, we find no merit in the argument that the less benefit principle may validate this regulation. We reach this conclusion because the regulation on its face is not limited to any subcategories of AFDC eligibles, but purports to apply, and is applied, to

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12. On the evidence before us the conclusion is equally tenable that the maximum grant regulation was adopted to make the entire AFDC program more palatable politically. Perhaps those purposes were inspired, however, by unarticulated notions of the "principle of less benefit."

AFDC eligibles as a group. While the purposes which defendants assert may have a logical connection with one or more subcategories of AFDC eligibles, alone or in combination, they have no logical connection with the group as a whole; hence, the regulation is invalid on its face for overreaching. We turn to a consideration of the claimed rational functions which defendants assert.

AFDC is not limited to dependent children or families with dependent children deprived of parental support or care by reason of continued absence from the home. Discouragement of desertion as a rational basis for the maximum grant regulation can have application only to the continued absence subcategory of AFDC; it can have no application to dependency which arises because of death, unemployment, or physical or mental incapacity of the wage earner. The named plaintiffs Junius Gary and Jeanette Gary are examples of eligibles to whom this purpose has no logical application. Even when eligibility for AFDC is predicated upon continued absence from the home, dependent children and families with dependent children may still receive payments in excess of the maximum grant, if those children in number in excess of the cut-off point are placed with other relatives, a child-care institution, a child-placement or a child-care agency. A parent who is willing to desert to give his children or his family eligibility for AFDC on this basis can hardly be presumed to voice stringent objection to further breakup of the family

unit to gain advantage from this unusual aspect of the Maryland regulation. Thus, the maximum grant regulation not only subverts the statutory goal of preserving intact the family unit, but it is also ineffective to discourage eligibility by continued absence from the home.

The same is true with regard to the claimed purpose of inducing a surviving parent to seek employment, namely, that it is inapplicable to inability to work or lack of employment and is ineffective to achieve its purpose even in the subcategory to which it might be efficacious. Other considerations also come into play. The basic purpose of AFDC is to aid needy children, and to achieve this schedules of need based upon the cost-of-living have been established by the state. The principle of "less benefit" can have no application to those under the age when the state will permit them to work.[13] The evidence indicates that only a relatively small percentage of families (166 out of 2,537, or

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13. Like every enlightened jurisdiction, Maryland regulates the employment of minors. Those under 14 are prohibited from engaging in any gainful employment. Those over 14 but under 16 may not be employed during school hours, with certain exceptions, or in certain occupations. All minors under 18 are prohibited from engaging in certain occupations and females over 16 but under 18 from engaging in certain occupations permissible for males. See, generally, 8B Ann. Code of Md., Art. 100, §§ 4, et seq.

These ages should be compared to the age limitations to qualify one as a "dependent child," i. e., under the age of 18, or, in the case of a student, under the age of 21. 42 U.S.C.A. § 606.

6.5%) receiving AFDC payments are classified as having employable numbers. To what percentage of the 6.5% of total AFDC beneficiaries the maximum grant regulation is applicable is not disclosed. The evidence does show that the plaintiffs Junius Gary and Jeanette Gary, his wife, are receiving AFDC payments because of sickness and disability, and neither they nor the named plaintiff Linda Williams are employable. It is simply irrelevant to apply the "less benefit" principle of encouraging employment to individuals who could not, in any event, be gainfully employed.

The state may have a legitimate interest in reducing its welfare rolls by encouraging those capable of so doing to seek and maintain gainful employment, but this goal can be furthered by such devices as work incentive programs, which are aimed precisely at aiding and encouraging those who are in fact employable,[14] or by limiting the application of the

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14. We call attention to the provisions of § 407 of the Act, 42 U.S.C.A. § 607, which, beginning in 1961, expanded the definition of "dependent child" to include needy children deprived of parental support or care by reason of the unemployment of a parent. This section requires as part of the state's AFDC plan, in addition to the other conditions of § 402 of the Act, that the state provide such assurances as will satisfy HEW that fathers of dependent children will be referred to the Secretary of Labor for participation under a work incentive program, and for providing vocational education to encourage the retraining of individuals capable of being retrained. Moreover, the state is permitted to deny AFDC to any child or eligible relative "if, and for so long as, such child's father is not currently registered with the public employment offices in the state * * * ." § 407(b)(2)(C)(i).

regulation to those to whom it may be said to have some logical relation.

Defendants' contention that the maximum grant regulation was also initially promulgated to encourage parents to limit the sizes of their families is diffidently pressed. This asserted purpose merits little discussion. If, indeed, this is a purpose, the regulation, again, invalidly overreaches. It is not limited to children born after AFDC eligibility is established and, from the evidence, it appears that in the case of the named plaintiffs at bar no children have been born after the circumstances to produce AFDC eligibility occurred.[15]

(continued)

14. It is significant that the 1968 Amendments in expanding the work incentive program also limited its application to "unemployed fathers" rather than "unemployed parents." The legislative history of the 1968 Amendments makes clear that the new work incentive program which they established was not intended to apply to "a mother who is in fact caring for one or more children of preschool age, if such mother's presence in the home is necessary and in the best interest of the children." Senate Report No. 744, 90th Cong., 1st Sess., 2 U. S. Code Cong. Ser. 2859, 2904 (1967). Plaintiff Linda Williams is literally within that category. Thus, there is legislative recognition that the principle of less benefit was not intended to apply to her and others similarly situated.

15. The objective of family planning is part of the Act and treated with greater specificity and logic therein. By the 1968 Amendments, § 402 of the Act, 42 U.S.C.A. § 602, now requires, as part of the state's AFDC plan, that the state develop a program to achieve the objective of "preventing or reducing the incidence of births out of wedlock and otherwise stengthening family life," and for implementing this program by assuring that

Thus, in the case of the named plaintiffs at bar, it appears that the claimed purposes of the maximum grant regulation are either totally inapplicable or patently ineffective to accomplish their objectives, and consideration of the several bases of eligibility for AFDC within the group on whose behalf the named plaintiffs sue, indicates that the same is true of other categories, the substantiality of which is not disclosed. Because it cuts too broad a swath on an indiscriminate basis as applied to the entire group of AFDC eligibles to which it purports to apply, the maximum grant regulation cannot be sustained under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

- III -

We modify our previous opinion to the extent that we do not decide whether Maryland's maximum grant regulation conflicts with the Act, as amended. On the constitutional basis of our prior decision, however, we find no reason to reach a result different from that previously announced. We reiterate our previous conclusion that Maryland's maximum grant regulation transgresses the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

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15. (continued)

"in all appropriate cases family planning services are offered to them [applicants for AFDC] * * * ." § 402(a)(15) of the Act, 42 U.S.C.A. § 602(a)(15).

The Clerk is directed to enter a short order on the docket, granting in part, and denying in part, defendants' motion, as set forth in this opinion. In accordance with our previous instructions, plaintiffs have submitted a proposed form of decree. Defendants shall present their comments thereon, and, if they be so advised, their suggested form of decree, within five days.

United States Circuit Judge

Chief Judge
United States District Court
for the District of Maryland

United States District Judge

YALE LAW SCHOOL
NEW HAVEN, CONNECTICUT 06520

March 11, 1969

Carl Racklin, Esquire
164 Madison Avenue
New York, New York 10016

Dear Carl:

Please find enclosed a copy of the second opinion in the Dandridge case, as per your request. See you on Wednesday.

Best regards.

Sincerely,

Ed

Edward V. Sparer

EVS/gdf
enclosure.

A - Page
B - Thal
C - Emmo
D - Dec

WILLIAMS VS. GOODMAN DETROIT 1965
(LANDLORD - TENANT DISPUTES)

Box 44
Folder 8

Wisconsin

Please Retain Original Order

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Edward R. Williams,
Victor Glenn, Charlie Little,
Willie Wade, Dan Hudson,
Dorothy Hudson and Evelyn Wheeler,

Plaintiffs,

vs.

Civil Action

Albert Goodman, Sam Goodman,
Hyman Goodman, individually and d/b/a
Dexwood Apartment Company,
a Co-Partnership, and Wayne County
Circuit Court Commissioners Court,
jointly and severally,

No. _____

Defendants.

_____/

COMPLAINT FOR INJUNCTION
AND DECLARATORY JUDGMENT

Now come Edward A. Williams, Victor Glenn, Charlie Little, Willie Wade, Dan Hudson, Dorothy Hudson and Evelyn Wheeler, plaintiffs herein, by and through their attorneys, Sheldon Otis and F. Philip Colista, and complaining against Albert Goodman, Sam Goodman, Hyman Goodman, individually and d/b/a Dexwood Apartment Company, a co-partnership, and Wayne County Circuit Court Commissioners Court, jointly and severally, and say:

I.

Plaintiffs are residents and citizens of the City of Detroit, County of Wayne, State of Michigan.

II.

The individual defendants are residents and citizens of the State of Michigan, and Dexwood Apartment Company is a co-partnership consisting of the individual defendants, having its principal place of business and conducting and operating business in the City of Detroit, County of Wayne, State of Michigan.

Defendant Circuit Court Commissioners is a duly created court of the State of Michigan with jurisdiction over landlord-tenant cases, and having jurisdiction to dispossess tenants in proceedings before said court, and are acting in the premises under MSA 27.1186 et seq., and 26.1101 et seq.

III.

Jurisdiction is founded on 42USC §1983; USCA Const. Amends 1 and 14.

IV.

Defendant individuals and company own and operate within the City of Detroit a large number of apartment buildings which they lease for multiple dwelling purposes; some of such apartment buildings are located at 2210 Pingree, 1744 Seward, 1600 Seward and 1774 Seward, in the City of Detroit, State of Michigan.

V.

Plaintiff Edward Williams is, and has been for a period of 4 years, a resident and tenant of defendants, residing at 2210 Pingree, Apartment 108.

VI.

Plaintiff Victor Glenn is, and has been for a period of 3-1/2 years, a resident and tenant of defendants, residing at 1744 Seward, Apartment 8.

VII.

Plaintiff Charlie Little is, and has been for a period of 4 months, a resident and tenant of defendants, residing at 1600 Seward, Apartment 215.

VIII.

Plaintiff Willie Wade is, and has been for a period of more than 2 years, a resident and tenant of defendants, residing at 1600 Seward, Apartment 319.

IX.

Plaintiffs Dan Hudson and Dorothy Hudson are, and have been for a period of 1 year, residents and tenants of defendants, residing at 1744 Seward, Apartment 5.

X.

Plaintiff Evenlyn Wheeler is, and has been for a period of 3 years, a resident and tenant of defendants, residing at 1774 Seward.

XI.

There are approximately one hundred other persons who reside in and who are tenants of defendant individuals and company in the above described apartment buildings, and who are of the same class as the plaintiffs named herein.

XII.

The above described premises and approximately thirty other similar dwelling buildings owned and operated by defendant individuals and company are located in what is generally considered to be a "blighted" area of the City of Detroit.

XIII.

The buildings owned and operated by defendant individuals and company above described, particularly those which plaintiffs and the members of their class reside have suffered for some time and do now suffer from inadequate painting, absence of screens to keep out bugs and fleas, broken windows, cracked plaster, unlocked doors, absence of mailboxes, absence of fire alarms and fire extinguishers, overloaded electrical boxes, absence of adequate doorbells and absence of adequate pest control exterminations.

XIV.

The conditions so existing cause said buildings to be dubbed "slum" housing and contribute toward unsafe, unsanitary living conditions for plaintiffs; in addition, such conditions affect plaintiffs and their families with whom they reside so that they are psychologically depressed and

culturally deprived.

XV.

The conditions above described are a direct cause of lower standards of economic and moral conditions where plaintiffs and their families reside.

XVI.

In the past year plaintiffs were instrumental in forming tenant councils within defendant individuals and company buildings for the purpose of improving their standards of living, eliminating the factors existing in defendants' buildings contributing to the conditions above described, educating each other regarding habits of cleanliness and proper moral values, eliminate problems of delinquency by and between their children, maintaining clean hallways, approaching and dealing with city agencies to obtain help with police protection, tree trimming and compliance with municipal ordinances and laws.

XVII.

In pursuance of the above described objectives, plaintiffs and representatives of their tenant councils met with defendant individuals and company and asked for cooperation, and improvement of the poor conditions existing in defendants' buildings. In addition plaintiffs have posted and circulated flyers within said apartments containing, among other things, the following:

> "In order to do our part as tenants in keeping up the building please do the following:
>
> 1. Please do not leave garbage in the incinerator. Put down the chute.
> 2. Please try to keep your children from playing and making noise in the hallways.
> 3. If you see strangers loitering in the building, notify the caretaker so they can be asked to leave.
> 4. If your apartment needs extermination, leave your apartment number with the caretaker when paying your rent.
>
> TENANT COUNCIL"

1744 Seward

Please

Keep Incinerator

Area Clean

Tenant Council

P.S. If carrying garbage
out please do not leave it by the door.

- - -

TO ALL TENANTS! ! !

Good housekeeping requires the cooperation of each tenant.
Clean personal living habits reflect an attitude of pride and self-respect that demands the respect of others.
Let's all cooperate with the management in keeping the building clean by keeping the halls free of all litter and the area around the incinerator clean at all times.
Thank you !

The Tenant Council.

- - -

Plaintiffs also have distributed handbills, picketed and written to government agencies advertising the conditions under which they, through no fault of their own, are compelled to live.

XVIII.

Plaintiffs are hard working negro individuals whose sole and primary goal in taking the above described steps, is to improve their own lot in life, raise themselves by their own bootstrap to a respectable moral life for their families and generally meet and work together with themselves and other members of their class to discuss and resolve common problems they have.

XIX.

Plaintiffs, because of social, economic and educational deprivations of the past, have no choice but to live in the buildings they do, and if compelled to move will be thrust into the same or similar living

conditions above described.

XX.

Defendant individuals and company own and operate similar dwelling buildings in predominantly white neighborhoods, but such buildings are maintained without the conditions above described; the failure of defendant individuals and company to improve the conditions on plaintiffs' premises represents an intentional discrimination against plaintiffs, based on race.

XXI.

In order to break the back of plaintiffs' activities and tenant councils and to preserve the slum conditions on defendants' premises, defendant individuals and company, acting under color of law of the State of Michigan, have served notices to terminate tenancies on plaintiffs and members of their class. The sole purpose of defendant individuals and company is to punish plaintiffs for the exercise of their constitutional rights contrary to 42USC §1983, and thwart plaintiffs in their efforts to meet together and work together to help solve their common problems, contrary to US Const. Amends 1 and 14.

XXII.

The named defendants have received notices to terminate their tenancies, and other members of plaintiffs' class have received similar notices. Unless the relief requested herein is granted, defendants acting under color of state law, will successfully deprive plaintiffs of the above rights, and they will be made homeless by order of state court, thereby discriminating against them because of race and color.

XXIII.

Defendant Circuit Court Commissioners, acting under color of law of the State of Michigan, have entertained lawsuits to accomplish defendants' purpose of evicting plaintiffs solely for the reason above

described, and unless plaintiffs obtain the relief asked for herein, they and the members of their class will suffer irreparable injury, and will be evicted from their homes solely because of their efforts to improve their standards of living by the exercise of free speech and right of peaceful assembly.

XXIV.

Other members of plaintiffs' class and members of the Tenant Council have either received notices to terminate their tenancies or have been threatened with such notices if they continue the activities above described.

XXV.

Defendant individuals and company have refused to discuss such above described problems in good faith and have refused, neglected and failed to eliminate the condition of their premises causing and breeding crime, resentment and social cancer.

XXVI.

Plaintiffs bring this action for themselves and all residents of the buildings in which they live, and who have participated as above described individually and with the joint Tenants' Council, and who have received notices to terminate their tenancies or who have been threatened with termination of their tenancies for the reasons above described. The issues of law and fact herein are common.

XXVII.

Defendant individuals and company are absentee landlords who show little direct interest in the serious and degrading conditions under which plaintiffs are compelled to reside in, and the existing Tenant Council is a necessary vehicle for bringing such common problems as plaintiffs have, to the attention of defendant individuals and company for reasonable resolution.

XXVIII.

Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs ask for the following relief:

a) That upon filing of this Complaint an Order to Show Cause be issued, requiring defendants to show cause why a temporary order should not be entered restraining them from proceedings with actions now pending pertaining to plaintiffs in the Circuit Court Commissioners Court for the County of Wayne, State of Michigan, and that upon hearing of said Order to Show Cause, an order be entered restraining defendants from continuing with said actions pertaining to plaintiffs;

b) That upon hearing of this cause the temporary restraining order referred to above be made permanent;

c) That a declaratory judgment be entered providing that plaintiffs and the members of their class have a constitutionally protected right to peacefully assemble, picket, organize and encourage themselves and the members of their class to up-grade their standards of living, and to discuss and meet with defendant individuals and company for the purposes of correcting slum conditions on the premises where the plaintiffs and the members of their class reside, and that said declaratory judgment further provide that the statutes and laws of the State of Michigan/ particularly MSA 27.1986 et seq., MSA 26.1101 et seq., insofar as they ostensibly allow eviction of plaintiffs and the members of their class for the purpose of defeating plaintiffs and the members of their class in the activities above described, be deemed unconstitutional and contrary to the United States Constitution Amendments 1 and 14, and that said declaratory judgment further provide that plaintiffs and the members of their class have a right to assemble and meet to discuss common problems concerning the welfare of themselves and their families in the place of their residences

and that defendant individuals and company have a corresponding duty to meet with and discuss in good faith the problems above described pertaining to plaintiffs and the members of their class;

d) That this court grant such further relief as may be deemed reasonable, necessary and equitable.

Respectfully submitted,

S/ SHELDON OTIS
SHELDON OTIS

Dated: May 13th, 1965.

S/ F. PHILIP COLISTA
F. PHILIP COLISTA

Attorneys for Plaintiffs
1855 Guardian Building
Detroit, Michigan 48226
WOodward 3-1520.

LAW OFFICES
OF
COLISTA, WIGLE & MOORE
1763 GUARDIAN BUILDING
DETROIT, MICHIGAN 48226

F. PHILIP COLISTA
GERALD F. WIGLE
WARFIELD MOORE, JR.

CLARENCE LASTER, JR.

TELEPHONES:
961-5010
961-3797

APR 21 1965

April 20, 1965

Congress of Racial Equality
38 Park Row
New York 38, N.Y.

Attention: Carl Rachlin, Esq.
General Counsel

Dear Carl:

In reply to your letter of March 25, I have been searching for an attorney to handle CORE legal matters in Toledo. Ernest Mazey, director of Detroit ACLU has indicated to me that there probably are a few attorneys who have done legal work for ACLU in Toledo who might be interested in helping our local CORE chapter in that city. I will try to get a name or two off to you within a few days.

At our legal conference in New York you mentioned in passing that a recent Federal District Court decision held that a tenant has a constitutional right to injunctive relief were the tenant had complained to a city agency about housing conditions and the landlord in turn in retaliation evicted said tenant. Could you please supply me with details in this case including the title of court and cause.

Very truly yours,

Phil

Phil

FC/dg

Injunction v landlord in Fed Ct under §1983

Williams et al v Goodman et al

MAY 14 1965

SHELDON OTIS
ATTORNEY AND COUNSELOR
1855 GUARDIAN BUILDING
DETROIT, MICHIGAN 48226
WOODWARD 3-1520

May 13
1965

Mr. Carl Rachlin
30 Park Row
New York, N.Y.

Dear Carl :

Enclosed please find copy of Complaint, today filed in the U.S. District Court here in Detroit, regarding the eviction of tenants who have been leading participants in Detroit area tenant councils.

Please read the Complaint over and if you have any suggestions as to any amendments which we might make, please communicate those suggestions to us as soon as possible.

Also enclosed herewith please find a press release which we have issued.

The issues to be researched:

1. May a landlord evict a tenant for whatever reason, even though it be to curtail participation in tenant councils?

2. Does Title 42, §1983 give to the Federal Court jurisdiction to enjoin a State Court eviction proceeding when plaintiffs allege that the eviction proceedings deprive them of and punish them for the exercise of free speech and assembly, when such activity is directed at improving their living conditions?

3. Can a Federal District Court entertain this action, although the State Court has not yet ordered tenants to leave their apartments?

4. Does a Circuit Court eviction proceeding against a tenant constitute a State action?

Sincerely,

Phil

F. PHILIP COLISTA

FAC:om
Encs:

Irving Lesnick
Hamlett
v
Parell
Garden City
P1-7-
6300

May 17, 1965

Philip Colosta, Esq.
1793 Guardian Building
Detroit, Michigan

Dear Phil:

As I expected, your papers are very interesting. We are going over them here in New York. Please let me know your time schedule so that we don't run afoul.

It seems that there has been a case in the Federal Court which does bear on your problem and we hope to find that very shortly.

You will hear from me very soon. With best regards,

Sincerely,

Carl Rachlin

CR:YS

LAW OFFICES
OF
COLISTA, WIGLE & MOORE
1783 GUARDIAN BUILDING
DETROIT, MICHIGAN 48226

F. PHILIP COLISTA
GERALD F. WIGLE
WARFIELD MOORE, JR.

CLARENCE LASTER, JR.

TELEPHONES:
961-5010
961-3797

May 19, 1965

MAY 21 1965

Detroit
Williams
v
Goodman

Mr. Carl Rachlin, Esq.
38 Park Row
New York, N.Y.

Dear Carl:

On Friday, May 21, we are scheduled to appear before Federal District Judge Thaddeus Machrowicz on the Show Cause filed in the Tenants vs. Goodman case. We are hopeful that upon hearing both sides the Court will grant a stay of proceedings in the State Court and will allow us sufficient time to file briefs in this case.

We would appreciate having any information with regard to the case you mentioned in your letter of May 17, 1965. After Friday I will be in a better position to let you know what our time schedule will be so that you may have an opportunity to submit to us any theories of law, briefs or other materials which would be helpful to our cause.

Very truly yours,

F. Philip Colista

F. Philip Colista

FC/dg

Spoke to him on telephone several times - need him personally ~~4th Cir Court~~ Torres v G.C. Court

May 27, 1965

F. Philip Colista, Esq.
1793 Guardian Building
Detroit, Michigan

Dear Phil:

Enclosed is the photostatic copy of the decision by Judge MacMahon in Tarver v. G. & C. Construction Corp.

After you have finished with it, will you either return it of send me a copy because it is the only one extant.

How are you making out with the case?

Regards.

Sincerely,

Carl Rachlin
General Counsel

CR:JG

enclosure

30558

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
NOV 9 1964
5:30 pm
S.D. OF N.Y.

JAMES TARVER and ERNESTINE TARVER, individually and as representative of the class of Negro citizens of The Village of Port Chester, County of Westchester, State of New York,

Plaintiffs,

-against-

G. & C. CONSTRUCTION CORP., and BERNARD ABEL, individually and as representative of the class of landlords and/or agents engaged in the business of renting dwelling units primarily to Negroes, in The Village of Port Chester, County of Westchester, State of New York,

Defendants.

---

64 Civ. 2945

MEMORANDUM

MICROFILM
NOV 10 1964

MacMAHON, District Judge

Plaintiffs move for a preliminary injunction restraining defendants, or anyone acting in concert with them, from evicting plaintiffs from a three-room unfurnished apartment known as Apartment #3, 54 South Main Street, Port Chester, New York.

The verified complaint purports to bring a class action on behalf of the Negro citizens of the Village of Port Chester against landlords or agents engaged in the business of renting dwelling units primarily to Negroes in that village. It is broadly alleged that defendants have entered into a conspiracy under color of State law to deprive plaintiffs and Negro citizens of the Village of Port Chester of their Constitutional rights. Jurisdiction is invoked under 28 U.S.C. §§ 1331(a), 1343(3) and (4), 2201, 2202, and 2281; 42 U.S.C. §§ 1981, 1983, and 1985; the Constitution of the United States and, in particular, the First, Fifth, Thirteenth, and Fourteenth Amendments thereto; and the Civil Rights Act of 1964. The amount in controversy is alleged to exceed $10,000.000, exclusive of interest and costs.

The issues on this application for a preliminary injunction are considerably narrower than those raised by the complaint. There is not the slightest evidence before the court which would enable us to determine whether or not this is a proper class action. See Chaffee v. Johnson, 229 F. Supp. 445, 448 (S.D. Miss. 1964). Nor is there any evidence which would

support a finding of either a conspiracy or any kind of racial discrimination. Those matters will have to await proof upon the trial.

All that has been shown on this application is that sometime in January or February 1964, the individual plaintiffs, James Tarver and Ernestine Tarver, rented the above-described apartment, at a rental of $35.00 per week, from defendant G. & C. Construction Corp., which is managed by defendant Bernard Abel. On September 11, 1964, at about 12:30 P.M., Mrs. Tarver complained to the Health Department of the County of Westchester about a clogged toilet which resulted in an unsanitary and unsafe condition in the apartment. Apparently sometime during that afternoon, the Health Department telephoned defendant Bernard Abel about Mrs. Tarver's complaint. That evening, at about 5:30 P.M., Mrs. Tarver received by hand delivery a letter from defendant G. & C. Construction Corp., by defendant Bernard Abel as agent, notifying the Tarvers that commencing on September 19, 1964 their rent would be increased to $150.00 per week and warning that failure to comply with the increased rent would result in immediate eviction. On October 2, 1964, the landlord

served a notice to terminate the Tarvers' tenancy advising them that they were required to quit and vacate the premises on October 9, 1964.

The foregoing facts are not in dispute, and on the basis of them, we find that the Tarvers have made a clear showing that they will probably be able to prove upon the trial that they are threatened with eviction solely because they exercised their Constitutional right to petition for a redress of their grievances. Indeed, we think the undisputed facts and the sequence and interval between the events permit no other inference.

Prima facie, the Tarvers have established a threatened violation of their Constitutional rights. Not every violation of a Constitutional right, however, warrants the intervention of a federal court in a State civil proceeding. Indeed, "a court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The "hands off" policy embodied in 28 U.S.C. § 2283 has the salutary purpose of avoiding friction between State and federal courts in ordinary

litigation between private litigants. Nevertheless, we think it clear that this court has original jurisdiction under 42 U.S.C. § 1983 over the claim made in the verified complaint which seeks a permanent injunction restraining defendants, their agents, attorneys, and all others acting in concert with them from evicting plaintiffs for any cause other than the payment of the agreed rent of $35.00 per week, and from impeding, interfering with, or deterring plaintiffs from the exercise of their Constitutional rights. Monroe v. Pape, 365 U.S. 167 (1961). We find it unnecessary, therefore, to determine whether jurisdiction also may be grounded on the other statutes and Constitutional provisions upon which plaintiffs rely.

Defendants' contention that, even assuming a violation of Constitutional rights, plaintiffs have failed to show that defendants are acting under color of State law is untenable. Patently eviction requires the action of State courts and State judicial officers, acting in their official capacities, and is action of the State within the meaning of the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S. 1 (1948). If the Tarvers are evicted by State court proceedings prior

to the trial of this action, a final decree in favor of plaintiffs would be futile. We hold, therefore, that an injunction is necessary in aid of our jurisdiction and in order to effectuate the judgment of this court should it ultimately decide in favor of plaintiffs. In these circumstances, an injunction is not proscribed by 28 U.S.C. § 2283.

The Tarvers have shown that they are people of modest means with two children, that they are unable to pay the increased rent demanded, and that it would be extremely difficult, if not impossible, for them to find other suitable living quarters at $35.00 per week. Against this, if the injunction is granted, defendants will only be deprived of increasing their rent beyond $35.00 per week, which defendants found adequate before the incident which forms the basis of this suit. We think in these circumstances, on a balance of the equities, that plaintiffs have made a sufficient showing of irreparable injury.

Accordingly, the motion for a preliminary injunction is granted to the extent that the named defendants are enjoined from evicting the named plaintiffs, or

from in any way impeding, interfering with, or retaliating against the named plaintiffs for their exercise of their Constitutional right to petition for a redress of their grievances. Settle order on notice within five (5) days, and, in the meantime, the temporary restraining order heretofore granted shall remain in effect.

So ordered.

Dated: New York, N. Y.

November 9, 1964

Lloyd F. MacMahon

LLOYD F. MacMAHON
United States District Judge

For Immediate Release

Albert Goodman, Sam Goodman and Hyman Goodman, owners of the Dexwood Apartment Company, have served notices upon several of their tenants that their tenancies are to be terminated, and actions have either been started or have been threatened against these tenants in the Wayne County Circuit Court Commissioners Court. Today, the tenants through their attorneys, Sheldon Otis and F. Philip Colista, have started a lawsuit in the Federal Court in Detroit to enjoin and restrain the Goodmans and their company from evicting the tenants because the tenants have engaged in the exercise of free speech and free assembly.

Selective eviction of certain residents from the apartments of Goodman, et al, represents a deliberate and premeditated attempt to obstruct and deny to those residents their rightful search for redress of grievances.

The legal intent of the eviction process is to guarantee to property owners proper and lawful occupancy of residential dwellings. Eviction is, by precedent, custom and law, the ultimate recourse when tenants do not meet the ordinary requirements of proper tenancy. These requirements pertain to prompt payment of rents, maintenance of the premises and behavior which properly respects the privacy of others.

The disturbing circumstances which mark the Goodman evictions show that none of the tenants affected are irresponsible tenants. On the contrary, these renters are being persecuted for precisely those traits which most landlords admire. Ideal tenants take pride in their surroundings, seek to

upgrade their condition, urge their neighbors to better their environment, and contribute to the general cleanliness and orderliness of the property and the area. For precisely these actions, the defendant tenants are marked for dispossession.

Like all other rights, the right to evict cannot be totally divorced from the circumstances under which it is applied. Unless limits are proscribed, approval of any right may be construed to extend far beyond the purposes intended. Freedom reaches only so far as it does not infringe upon and violate other and even more sacred rights than those whose protection is at issue.

Eviction has historically been regarded as an extreme deprivation of a basic necessity of life. The discomfort, the shame, the agony of dispossession are the scourge of the propertyless classes and the final degradation of those without other resources. In more recent times, eviction has became virtually synonymous with non-payment of rent. The classic scene symbolic of family tragedy is the sorry accumulation on the sidewalk of bewildered people hovering over a few miserable household possessions.

These evictions are more than improper and immoral . . . they are illegal. The evictees are marked targets fingered for removal as undesirables because they have the courage to demand their rights as tenants. They are as hostages to an enemy who would intimidate and silence the many by eliminating a few. To fail to offer resistance to this eviction effort would amount to surrender of basic, irreducible rights of free speech and assembly guaranteed under the First Amendment of the Constitution.

Each of the tenants marked by the Goodmans for removal from the premises is an important figure in one of several tenant councils organized to upgrade residential living conditions. As leaders in the tenants councils, these persons seek to effect a clean-up, paint-up and fix-up of their buildings. They are prepared to catalog an appalling list of building code violations, neglected safety needs, tolerance of faith and decay which characterize the Goodman-owned properties. They have petitioned their landlords, peaceably and repeatedly, to cooperate with the tenants to prevent the spread of blight and to help maintain minimum dwelling standards of health and decency.

Instead of responding to these reasonable requests, and contrary to their own best interests, the landlords have arrogantly ignored the pleas and discouraged all attempts to halt the detioration and erosion of the buildings and the tenants' surroundings.

The purpose of these evictions is the destruction of the tenants' councils. To permit the evictions is to subvert the councils. To dispossess these tenants is to penalize them for their community loyalty and to thwart their pursuit of safety,health and confort in their domicile.

Even worse, these evictions would have in effect dissolve the tenants' councils and destroy the vehicles of expression which the Goodmans find so irritating and troublesome. To evict these tenants is to deprive them of their right to speak, to organize and to protest conditions which are individually degrading and socially abhorrent.

The right of citizens to assemble and to organize is equally sacred whether the participants are workers, employers or renters. The history of the American labor movement with its achievement of specific guarantees for the freedom to organize testifies to the importance with which these rights are regarded. These tenants are in no way less privileged.

A slum neighborhood is the most destructive, costly and debilitating curse of the modern city. We can ill afford mmre of these breeding grounds of pestilence, crime and immorality. It is not the purpose of the law to act as a bulwark of support for those property owners whose neglect and penury allow respectable neighborhoods to slip into decay. On the contrary, it is the function and the duty of society to expose the forces that would encourage blight and to support those who conscientiously and courageously insist upon upholding a decent and healthful environment. The right of tenants to organize in groups based upon places of residence is inviolable. Their freedom to pursue legitimate objectives through groups of their choosing demands the full protection of the law.

WILLIAMS vs. P.M.A. 1968
(FIRING OF FIFTY MEN)

Box 44
Folder 9

Wisconsin

Please Retain Original Order

WORKERS DEFENSE LEAGUE

112 EAST 19th STREET, NEW YORK, N.Y. 10003 / (212) ALGONQUIN 4-4953

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Roy Wilkins
Pearl Willen
Jerry Wurf
James E. Youngdahl

March 25, 1968

Mr. Carl Rachlin,
Legal Director
Scholarship, Education &
Defense Fund for
Racial Equality
164 Madison Avenue
New York, N.Y. 10016

Dear Carl:

Enclosed are two copies of the projected budget for the Bridges case. It was prepated by Irving Thau and these are pretty much maximum costs as you can see. He also stated that if we cannot finance all of this budget he would simply have to cut down and work within whatever budget we can supply him.

I told Irving of your offer to assist him and he was favorable to the idea. I wonder if Rowland, Irving and I could meet with you and Marvin Rich this Friday afternoon to discuss the project. Irving will be in the city then and will have a draft statement of purposes on the case prepared. Please telephone me and let me know if such arrangements can be made.

Fraternally,

Joe

Robert Joe Pierpont,
Administrative Secretary

RJP:msb
Encls.
CSAE/1707

P.S. I just talked with Irving and Friday will not be a good day to meet. We suggested Tuesday, April 2nd.

FOR YOUR INFORMATION

Workers Defense League

Proposed budget for trial in Williams v. P.M.A.

Depositions of defendants (10 persons to be examined)	$ 3,500.00
Copies of transcripts of depositions of 55 plaintiffs	2,750.00
Subpoenas (Service and attendance fees)	500.00
Stenographic services	2,700.00
Travel expenses	1,000.00
Services of local counsel	5,000.00
Stationery, Postage, telephone & photostating	350.00
Trial Counsel (including taking of depositions, trial preparation and trial - 18 weeks	10,800.00
Appeal to Court of Appeals 9th Circuit (printing expenses and travel for arguments).....	10,000.00
Unforeseen contingencies and miscellaneous overhead	3,400.00
Total	40,000.00

DRAFT 4/19/1968 Foundation Proposal - Williams v. P.M.A.

The Workers Defense League wants to apply to the _____ to help in legal, travel, and other expenses necessary to return fifty-one fired class B longshoremen to their jobs on the West Coast Waterfront.

HISTORY OF THE CASE

For the last five years the Workers Defense League has spent over $ 20,000 in court costs, travelling expenses, legal printing costs and secretarial fees in the process of pressing legal action to establish the right of 51 longshoremen to have their case heard in Federal Court. (A financial report on the case to this point is attached.) On March 18, 1968, the U.S. Supreme Court denied review of a Ninth Circuit Court of Appeals decision upholding the claims of the men. With this victory the next step is to argue the legality of the firings in the District Court in California. WDL believes this to be a case which puts to the test the question of whether or not once all procedures within the union structure have been exhausted, workers can go to the courts to legally enforce democratic procedures in their unions and to protect their right to earn a living.

1) The B-man status: The 51 men were part of a group of approximately 600 who were brought into the longshore industry in San Francisco in 1959 under the new classifi-

cation of B-men. As B-men they paid hiring hall dues but they were not allowed to become members of the union (International Longshoremen's and Warehousemen's Union). They could attend union meetings, but they had to sit in a segregated section of the balcony and had neither voting nor speaking rights. They did the more difficult work and got only the jobs left over after the A-men had taken first choice. They were required to be present at hiring halls 70% of the time based on a 7 day week. They were not allowed to hold any other jobs, full or part-time, nor were they allowed to attend a college or trade school. Many of the rules governing working conditions did not apply or were not enforced for B-men and they were subjected to speed-ups and other conditions which A-men were contractually protected from.

2) <u>How they were fired</u>: In 1959 when the B-men were brought into the industry they were promised promotion to A status within six months to a year. It was four years, however, before processing of B-men to A status was begun. Local 10, International Longshoremen's and Warehousemen's Union had jurisdiction of these B-men and began processing them for promotion to A status. Harry Bridges, President of the ILWU, demanded that Local 10 vote out 90 unnamed B-men. When the local 10 membership objected, Bridges threatened that no B-men would be promoted unless the 90

"John Does" were voted out; "You won't let the few stand in the way of the many, will you?" The membership voted them out and on June 17, 1963, 82 longshoremen received unsigned letters on the stationary of the Joint Port Labor Relations Committee of the Pacific Maritime Association, the association of employers, and the ILWU, informing them that they were fired. The meetings, or trials,at which the decision to fire these men were made occurred without the men being notified. The letters did not state what offenses the men had been found guilty of but stated that they were being deregistered for "cause." It also stated that if they could supply proof in writing of the innocense, they would be allowed an appeal hearing.

About 70 of the 82 men were granted appeal hearings. The jury to which the men appealed was composed of the Joint Port Labor Relations Committee aided by several PMA attorneys and four ILWU prosecutors. As each appelant was seated the hearing chairman read a prepared statement to the effect the men would; a) not be allowed counsel or witness; b) not be told the nature of the charges against him but only the general area of infraction and if he desired to know the exact nature of the charges he could go a week later to the ILWU-PMA records office where a clerk would supply him with the information. He should arrive there alone, without counsel or witness. The hearing presently being

conducted constituted the basis for the decisions that would be made on the appeals; c) he would be notified of the decision of the hearing in two weeks but if he felt he had been discriminated against and wanted to appeal further he would have to do so within 10 days or prior to the time he learned the decision of the hearing he would be appealing; and d) he was informed that the purpose of the hearing was to allow him to make any statement he desired in his own defense.

After the men had been fired over 50 of them applied for unemployment insurance and learned that their right to that had been challenged by the PMA. The men appealed and, subsequently, the unemployment insurance hearing board ruled that they would not have been fired.

In April of 1964, having been denied all appeals the men filed suit in Federal Court against Harry Bridges and all officials of both the union and management who were responsible for their firings. Shortly thereafter the Workers Defense League entered the case providing legal representation and finances to carry the case through to the present. In October of 1965, theFederal District Court dismissed the complaints of the 51 men stating that they should have sought relief with the

National Labor Relations Board. Five of the men had already done that. The NLRB examined ruled in their favor and ordered them returned to their jobs with back pay. In November the general counsel of the NLRB in Washington, D.C. reversed the San Francisco ruling. The WDL appealed the District Court decision and the Ninth Circuit Court of Appeals on August 28, 1967, overturned the District Court decision thereby opening the way for a trial on the merits of the case. The ILWU and the PMA asked the U.S. Supreme Court for review of that decision and it was denied. We now return to the District Court for trial.

WHAT IS THE WORKERS DEFENSE LEAGUE AND WHAT IS ITS INTEREST IN THIS CASE.

The Workers Defense League is a national non-partison organization devoted to the vigorous defense of democratic rights and social justice. Founded in 1936, it has a vital history of effective service on behalf of justice to workers, in defense of the trade union movement and on behalf of union democracy. WDL has actively supported the trade union movement on the questions of the right to organize and the right to strike. It has also represented individual workers in their struggles with both management and with impersonal, bureaucratice and sometimes corrupt trade unions. Among the more recent cases similar to the one under consideration

are Schoenfeld v. International Brotherhood of Painters, Decorators and Paperhangers of America. WDL cooperating attorney, Burton H. Hall represented a group of rank-and-file painters who were demanding the end of a trusteeship over District Council 9 of the painters union and free, court supervised elections for all offices. Mr. Hall handled the case with full WDL cooperation and WDL Legal Committee Chairman, Irving A. Thau and President, Rowland Watts, filed a brief amicus curiae on behalf of the rank-and-file painters. The case was won and in the resulting court supervised elections, the rank-and-file leader, Frank Schoenfeld, won an overwhelming victory. District Council No. 9 is now one of the most democratic and responsible unions in the country. Full mass membership meetings are held regularly for the first time in decades and ultimate involvement of the membership in the running of the union has insued. WDL is presently representing members of several unions in their attempts to receive cost of living payments, upgrading of seniority rights and others. We were active in the fight for the right to organize among New York City's taxi industry and have given legal and tactical advice to nurses involved in a fight for union recognition and collective bargaining rights in a New York hospital.

The Workers Defense League has many prominent people from the

the labor movement, and civil liberties and civil rights movements on its board to whom it can go for advice and counsel. Among those are:

Mr. Joseph A. Beirne, President of the Communications Workers of America and a Vice-President of the Workers Defense League

Mr. Patrick Gorman, Secretary-Treasurer of the Amalgamated Meat Cutters Union and a Vice-President of WDL.

Mr. Paul Jennings, President of the International Union of Electrical Workers and a Vice-President of WDL.

Mr. A. Philip Randolph, President of the Brotherhood of Sleeping Car Porters Union and a Vice-President of WDL.

Mr. Norman Thomas, WDL President Emeritus.

Mr. Irving A. Thau, Chairman of WDL's Legal Committee and
Carl Rachlin,)
Ernest Fleischman,) WDL National Counsel
Francis Heisler,)

Burton H. Hall,) WDL Cooperating Attorneys
Floyd Feldman,)

all well known lawyers with much experience in labor, civil rights and civil liberties.

When the Workers Defense League entered the longshorecase it was investigated by the WDL Legal Committee, the Labor Rights Committee and the Administrative Committee before the case was accepted. The WDL then set up a sponsoring committee to help the men and their Longshore Jobs Defense Committee. The members of this sponsoring committee are:

Daniel Bell
Herman Benson
Dr. Thomas N. Burbridge,
Matthew D. Clarke,
Herbert Gold,
Gordon Haskell,
Nat Hentoff,

Herbert Hill
Norman Hill,
Paul Jacobs
Julius Jacobson
Prof. Seymour Martin Lipset
Philip Selznick
Rev. William Shirley
Harvey Swados
Norman Thomas

The Sponsoring committee is chaired by Michael Harrington and Bayard Rustin.

WDL lawyers representing the 51 men are Irving A. Thau, Arthur Brunwasser and Francis Heisler.

[illegible], ROBERT VS. BECK, HENRY ARKANSAS 1967

Box 44
Folder 10

Wisconsin

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[Enclosed, Mettsner to Nagler, 1967, Jan. 30] WF

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF ARKANSAS

NO._____

ROBERT WINTERS,	:
Petitioner	:
v.	:
CAPTAIN HENRY BECK, Superintendent of the Pulaski County Penal Farm, Clint Cavin, Surety,	:
Respondents.	:

PETITION FOR WRIT OF HABEAS CORPUS AND

INJUNCTIVE RELIEF

Petitioner's verified petition respectfully avers that:

1. The jurisdiction of this Court is invoked under 28 U.S.C. §2241 (C) (3) (1964) to release petitioner from custody of respondents in violation of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. The petitioner, Robert Winters, is a Negro Citizen of the State of Arkansas and the United States restrained of his liberty in violation of the Constitution of the United States.

3. Respondents are Captain Henry Beck, Superintendent of the Pulaski County Penal Farm and Clint Cavin, Surety, custodians of petitioner pursuant to the judgment of the Municipal Court of the City of Little Rock and orders of the Supreme Court of Arkansas.

4. On May 13, 1965, petitioner was arrested and

charged with "immorality" in violation of Ordinance No. 25-121 of the City of Little Rock, a misdemeanor. The Ordinance reads as follows:

> It is hereby declared to be a misdemeanor for any person to participate in any public place in any obscene or lascivious conduct, or to engage in any conduct calculated or inclined to promote or encourage immorality, or to invite or entice any person or persons upon any street, alley, road or public place, park or square in Little Rock, to accompany, go with or follow him or her to any place for immoral purposes, and it shall be unlawful for any person to invite, entice or address any person from any door, window, porch or portico of any house or building, to enter any house or to go with, accompany or follow him or her to any place whatever for immoral purposes.
>
> The term "public place" is defined to mean any place in which the public as a class is invited, allowed or permitted to enter, and includes the public streets, alleys, sidewalks and thoroughfares, as well as theaters, restaurants, hotels, as well as other places. The term "public place" is to be interpreted liberally.
>
> Any person found guilty of violating the provisions of this section shall, upon conviction, be fined in any sum not less than ten dollars, nor more than two hundred and fifty dollars or imprisoned for not less than five days nor more than thirty days, or both fined and imprisoned.

5. Petitioner and a co-defendant were arrested at approximately 4:15 a.m., and brought before a judge of the Municipal Court, City of Little Rock, the same day, where they were tried and convicted. Petitioner received a jail sentence of 30 days and a fine of $254.00, including court costs. As petitioner was unable to pay the fine he was sentenced to work it off at the Pulaski County Penal Farm at the rate of $1.00 per day and remitted to custody for a total of 284 days as provided by Arkansas Statutes Anno., §19-2416. A copy of the transcript of proceedings before the Municipal Court is attached, and incorporated herein, as Exhibit A.

6. Petitioner did not seek a trial de novo, his as a matter of right under Arkansas Law, for the reason that, not having the advice of counsel, petitioner was not aware of further remedies provided by the Law of Arkansas.

7. On October 20, 1965, petitioner filed as a poor person a writ of habeas corpus or in the alternative, a writ of error coram nobis in the Municipal Court of the City of Little Rock, alleging violation of his rights under the Constitution of the United States in that:

(i) he was in custody of the state in order to satisfy a Municipal Court sentence, fine and commitment;

(ii) he had been tried and convicted in violation of state and federal Constitutions "without the benefit of counsel and without being advised of his right to counsel."

(iii) the penalties assessed against petitioner because of his poverty deprived him of equal protection of the law.

8. Petitioner requested relief against his unconstitutional restraint, sentence and fine and sought release on his own recognizance pending consideration of the issues raised by the petition. The Municipal Court denied the petition October 27, 1965.

9. Also on October 27, 1965, petitioner filed a like petition for habeas corpus or alternatively for writ of error coram nobis in the Circuit of Pulaski County which petition was denied on October 28, 1965.

10. The following day petitioner sought relief by petition for habeas corpus in the Supreme Court of Arkansas, a copy of said petition is attached, and incorporated herein, as Exhibit B. On or about November 4, 1965, the Supreme Court entered an order staying execution of petitioner's sentence pending consideration of the petition and releasing petitioner in custody of sufficient surety. On December 20, 1965, the court denied the petition on the ground that petitioner, charged with a misdemeanor, not a felony, was unentitled to

counsel. That decision is reported 239 Ark. 1055, 397 S.W. 2d 364 (1965). On January 6, 1966, a petition for rehearing was filed with the Supreme Court of Arkansas reasserting petitioner's federal constitutional claims. The petition for rehearing was denied January 24, 1966. On February 7, 1966, the Supreme Court of Arkansas stayed its mandate in order to permit petitioner to seek review of its judgment in the Supreme Court of the United States.

11. A petition for writ of certiorari on behalf of petitioner was filed in the Supreme Court of the United States March 29, 1966 to review the December 20, 1965 order of the Supreme Court of Arkansas. On October 17, 1966 the Supreme Court of the United States denied the petition.

12. Petitioner is now in technical custody of respondent Clint Cavin, Surety, upon petitioner's bond to appear in order to serve the remainder of his sentence heretofore mentioned after disposition by the United States Supreme Court of the petition for writ of certiorari. Petitioner is presently threatened with and subject to remission to respondent Captain Henry Beck.

13. Petitioner was tried and convicted without benefit of counsel and without being advised his right to counsel, the nature of the charges against him, the possible penalty, his right to make objections, cross-examine witnesses, present witnesses in his own behalf, or to have a trial <u>de novo</u> in the Circuit Court pursuant to Ark. Stat. Anno. §44-115, 509. Petitioner's conviction, therefore, deprives him of his liberty without due process of law or equal protection of the laws as secured by the Sixth and Fourteenth Amendments to the Constitution of the United States.

14. The penalties assessed against petitioner by the Municipal Court of the City of Little Rock deprive him of the equal protection of the laws secured by the

Fourteenth Amendment to the Constitution of the United States in that the substitution of 254 days in jail as punishment for petitioner's failure to pay a fine and court costs of $254.00 is provided by Arkansas Statutes Anno., §19-2416 (1947) arbitrarily imposes imprisonment for no other reason than indigency.

15. Petitioner was tried and convicted in violation of the due process clause of the Fourteenth Amendment in that the Ordinance pursuant to which he was prosecuted is vague, ambiguous and uncertain.

16. Petitioner has exhausted his available state remedies as heretofore stated. No further remedies exist in the courts of the State of Arkansas whereby petitioner may terminate his unconstitutional detention without suffering irreparable injury.

17. No previous application to this court or to any federal court or judge has been made for a writ of habeas corpus on the grounds alleged herein.

18. Due to poverty petitioner is unable to pay the costs or fees of this proceeding or to give security. Therefore, notwithstanding petitioner is and believes he is entitled to redress.

WHEREFORE, petitioner prays the court as follows:

(a) that the writ of habeas corpus immediately issue to respondents.

(b) that the respondents be required to appear and answer in writing the allegations of this petition.

(c) that after full and complete hearing this Court relieve petitioner of the unconstitutional restraint and sentence.

(d) that the execution and service of the judgement and sentence be ordered stayed until further proceedings are had in this Court

(e) that leave to proceed informa pauperis be granted.

(f) that the Court grant such other and further relief as to the Court appears just and proper under the circumstances.

In the alternative petitioner prays that a preliminary and permanent injunction issue enjoining respondents from threatening to maintain and maintaining custody over petitioner on the basis of the aforesaid judgment of the Municipal Court of the City of Little Rock on the ground that petitioner's trial, conviction and sentence are violative of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,

CARL RACHLIN
STEPHEN M. M.
150 Nassau St.

Lloyd A. McAulay
165 Broadway

~~JOHN W. WALKER~~
~~1304 E. Wright Avenue~~
~~Little Rock, Arkansas~~

JACK GREENBERG
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Attorneys for Petitioner

STATE OF WISCONSIN vs. GIVENS, JOHN H., 1964-1965

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STATE OF WISCONSIN vs. GIVENS, JOHN H., 1964-1965

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STATE OF WISCONSIN

IN SUPREME COURT

August Term, 1964 State No. 65, 66, 67, 68, & 69

STATE OF WISCONSIN,
Plaintiff-Respondent,
vs.
JOHN H. GIVENS,
Defendant-Appellant.

STATE OF WISCONSIN,
Plaintiff-Respondent,
vs.
CLARA E. WEAVER,
Defendant-Appellant.

STATE OF WISCONSIN,
Plaintiff-Respondent,
vs.
MARCELLINE TAYLOR,
Defendant-Appellant.

STATE OF WISCONSIN,
Plaintiff-Respondent,
vs.
ARLENE K. JOHNSON,
Defendant-Appellant.

STATE OF WISCONSIN,
Plaintiff-Respondent,
vs.
JERRY W. BERNDT,
Defendant-Appellant.

DEFENDANTS-APPELLANTS' BRIEF AND APPENDIX

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STATE OF WISCONSIN

IN SUPREME COURT

August Term, 1964 State No. 65, 66, 67, 68 & 69

STATE OF WISCONSIN, Plaintiff-Respondent,
vs.
JOHN H. GIVENS, Defendant-Appellant.

STATE OF WISCONSIN, Plaintiff-Respondent,
vs.
CLARA E. WEAVER, Defendant-Appellant.

STATE OF WISCONSIN, Plaintiff-Respondent,
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vs.
ARLENE K. JOHNSON, Defendant-Appellant.

STATE OF WISCONSIN, Plaintiff-Respondent,
vs.
JERRY W. BERNDT, Defendant-Appellant.

DEFENDANTS-APPELLANTS' BRIEF

NATURE OF APPEAL

This appeal via notice of appeal by defendants-appellants from a conviction, judgment and sentence for violation of Section 947.01(1) Wis. Stats. On May 27, 1964 defendants-appellants were found guilty of disorderly conduct by a jury. On May 24, 1964 defendants-appellants were sentenced by the Honorable John L. Coffey, Presiding Judge of the Circuit Court in and for Milwaukee County to pay fines of $100.00 plus costs; this sentence duplicating the County Court proceedings. Judge Coffey imposed no additional fine, the exact same fine remaining in full force and effect.

QUESTIONS INVOLVED

I. Were the sheriff's instructions and orders as given to the deputy sheriffs on the day of defendants' arrests a prior restraint on their right to freedom of speech, assembly, and right to petition government for redress of grievances?

Not answered by the Trial Court.

II. Were the sheriff's instructions and orders as given to the deputy sheriffs on the day of defendants' arrests and as implemented by these deputy sheriffs a denial of equal protection to the defendants under the Fourteenth Amendment?

Not answered by the Trial Court.

III. Were the defendants convicted of a crime under the provision of a state statute which, as applied to their acts, is so vague, indefinite, and uncertain as to offend the due process clause of the Fourteenth Amendment?

Not answered by the Trial Court.

IV. Were the defendants entitled to a judgment notwithstanding the verdict because the evidence adduced at the trial did not show defendants' conduct was disorderly or tended to cause or provoke a disturbance or was a clear and present danger to individuals or property at the time of the arrest and under the conditions that then prevailed?

Answered in the negative by the Trial Court.

V. Were the defendants entitled to a new trial in the interest of justice because the verdict was against the great weight of the evidence adduced at the trial and therefore failed to prove the necessary elements required for conviction under Wisconsin Statutes Section 947.01(1)?

Answered in the negative by the Trial Court.

STATEMENT OF FACTS

Mr. Eugene Grobschmidt, Chairman of the Milwaukee County Board of Supervisors, appointed Mr. Fred E. Lins as a member to the Greater Milwaukee Social Development Commission (R. 277, A-Ap. p. 111). This Commission was established to consider inner-city problems. The Commission deals very closely with the minority races in Milwaukee County (R. 323, A-Ap. p. 112, 124).

Mr. Lins made a statement at a public subcommittee meeting of the Commission, to-wit:

> "... some ways to be found to stop the ignorant, poor from coming to Milwaukee, you can't blame all the Negroes, they all look so much alike, you never know which one committed the crime and an awful mess of them had an IQ of nothing" (R. 366, A-Ap. p. 112).

On Wednesday, August 28, 1963 some members of the Congress of Racial Equality (CORE) began a peaceful demonstration at the Milwaukee County Courthouse, Milwaukee, Wisconsin, protesting the remarks made by Mr. Lins. This peaceful demonstration took place on the second floor of the Courthouse, in Mr. Grobschmidt's waiting room, room 214AA (R. 198, A-Ap. p. 113). Room 214AA in addition to being used as a waiting room is utilized for other purposes (R. 348, A-Ap. p. 113). Supervisors and visitors to the area drink coffee and play sheepshead in room 214AA (R. 348-349, A-Ap. p. 113-114). There were six chairs in the waiting room area in room 214AA on

August 28, 1963 for public use and the CORE demonstrators sat in these chairs (R. 209, 346, A-Ap.p. 114, 115). There were no sheriffs stationed at the door to room 214AA or in or about the adjacent corridors and rooms when the demonstration first began.

On Thursday, August 29, 1963 some members of CORE were arrested for sitting in the corridor adjacent to the door leading to room 214AA. Deputy sheriffs prevented CORE members from gaining entrance to room 214AA. (R. 208, A-Ap.p. 116). It is a matter of public record though not a part of this record on appeal that the CORE members arrested August 29, 1963 and charged with violating Wisconsin Statutes 947.01(1) were later found not guilty by a jury of twelve in the Milwaukee County Court.

Very early in the morning of Friday, August 30, 1963 a specially assigned group of Milwaukee County deputy sheriffs were stationed in the corridor and in or near rooms 213, Mr. Eugene Grobschmidt's private office, and 214AA in the Milwaukee County Courthouse. They were seven in number in addition to their leader, Sergeant Harry Reichert (R. 210-211, A-Ap.p. 117). More sheriffs were on a stand-by basis at the Milwaukee County Safety Building if the need arose for additional men (R. 225, A-Ap.p. 118). The sheriffs were in the area room 214AA prior to the start of a Milwaukee CORE demonstration (R. 172-173, A-Ap.p. 118). They were given their orders on the evening of August 29, 1963 and the morning of August 30, 1963 (R. 190-191, A-Ap.p. 119). One sheriff was assigned to Mr. Grobschmidt's private office, room 213 (R. 211, A-Ap.p. 119). Two sheriffs were assigned to the doorway leading into room 213 (R. 211, A-Ap.p. 119). The other deputies were on a stand-by basis (R. 212, A-Ap.p. 119).

The two deputies assigned to the doorway to Mr. Grobschmidt's private office, room 213, were ordered and instructed by Sergeant Reichert to allow no one to go into room 213 unless okayed by Mr. Grobschmidt or Sergeant Reichert (R. 223, A-Ap. p. 120). The two officers assigned to the doorway to the waiting room area 214AA were instructed by Sergeant Reichert to allow only authorized personnel, press, radio and television people and supervisors to use room 214AA and people who had appointments with supervisors or sought an appointment (R. 223, A-Ap. p. 120) The deputy sheriffs were to determine in their discretion who constituted authorized personnel and what constituted proper business without any further elaboration on Sergeant Reichert's part (R. 254, A-Ap. p. 121).

Mr. Grobschmidt stated the normal procedure for seeing a member of the County Board of Supervisors or himself would be for a citizen to open the door to room 214AA, approach the desk where the secretary sits, and then request the secretary whether they could have an appointment to see the supervisor or individual the person is interested in seeing (R. 286-287, A-Ap. p. 122). Mr. Grobschmidt admitted normally sheriffs are not stationed outside room 214AA to question citizens as to whether they have business or authorization to enter room 214AA (R. 287, A-Ap. p. 122).

On the same day, Friday, August 30, 1963, but after the deputy sheriffs were stationed at and in the Courthouse, members of Milwaukee CORE met at approximately 7:45 A.M. August 30, 1963, outside the Milwaukee County Courthouse (R. 318). At 8:00 A.M. peaceful picketing commenced until

10:30 A.M. in front of the Courthouse (R. 318). A number of men, women and students met the morning of August 30, 1963, at the Baptist Center located on the corner of North 3rd Street and Burleigh Street in the City of Milwaukee and walked to the Milwaukee County Courthouse where they joined the picket line then in progress (R. 402). At 10:30 A.M. approximately 20 persons left the picket line and entered the Courthouse proper and walked to a corridor on the second floor. They stood along the west wall in the corridor across from the waiting room to Eugene Grobschmidt's office (R. 247, A-Ap.p. 122-123).

After the CORE and other demonstrators reached the corridor area outside room 214AA, four CORE members gained entrance by permission to the office of Mr. Grobschmidt for a pre-arranged conference (R. 212). Approximately seventeen persons remained in the corridor. The delegates from CORE remaining in the corridor were orderly. At no time did they block the passageway. One man was going to sit down and as soon as the sheriff told him he could not do that he stood up immediately (R. 213, 232, 247-248, A-Ap.p. 123). Before and during the conference the corridor was clear and the delegates from CORE who remained in the corridor were cooperative. (R. 214, A-Ap. p. 123).

Inside room 213, Grobschmidt's private office, an orderly exchange of views between Grobschmidt and the four CORE negotiators took place (R. 175). At the time of the conference there was no disorderly conduct engaged in by the CORE negotiating team (R. 195).

The purpose of the conference was to request Mr. Grobschmidt to remove Mr. Fred E. Lins from the Greater Milwaukee Social Development Commission (R. 367, A-Ap. p. 125). It was the contention of CORE that Fred E. Lins, because of his statements, could no longer usefully serve on the Social Development Commission (R. 323, A-Ap. p. 124). Mr. Grobschmidt in no undecided terms said he would not ask Mr. Lins to resign (R. 278-279, A-Ap. p. 124).

At the conclusion of the conference the CORE negotiators arose from the table and proceeded to leave the room by the same door they had entered. They were instructed by a deputy not to use that door, but to go out another door which leads into room 214AA (R. 367). They left through the door into room 214AA as instructed by the sheriff (R. 367). On this day there were only two chairs in the waiting room area, room 214AA, whereas on Wednesday, August 28, 1963 there were six chairs (R. 346, A-Ap. p. 115).

The five defendants, John H. Givens, Clara E. Weaver, Marcelline Taylor, Arlene K. Johnson, and Jerry W. Berndt, began a peaceful demonstration to protest Mr. Grobschmidt's refusal to remove his appointee upon the unsuccessful completion of the conference (R. 322, 373-374, 390, 398, 402-403; A-Ap. p. 125, 126, 127).

Mr. Givens entered room 214AA and seeing no chairs vacant began his "sit-in" by sitting in an empty chair that had belonged to a receptionist (R. 367, A-Ap. p. 127). The record does not show there were any office employees present in this

waiting room, room 214AA, at this time. After approximately three minutes, Mr. Givens, not wanting to occupy a receptionist's chair, moved to the floor and sat with his back to a partition and his knees drawn up very close to his chest with his arms around his knees (R. 203, 322, 368; A-Ap. p. 128). He had an insignia four or five inches in size pinned on his chest. The sign read "LINS MUST GO - CORE" (R. 368, A-Ap. p. 128). Mr. Givens did not have his legs sticking out into the office or waiting room area (R. 203). A sheriff stated in reply to the question whether or not Mr. Givens impeded the aisle to Mr. Grobschmidt's office, or impeded access to his office, that you could get past him if you wanted to (R. 326). Mr. Givens' conduct or language while sitting in room 214AA was not abusive, profane, boisterous, unreasonably loud, or violent (R. 368-369, A-Ap. p. 129). Sergeant Reichert told Mr. Givens to get up or be arrested. When Givens remained mute and seated he was arrested (R. 216). When arrested Givens never resisted the sheriff in any way, and did not put his arms toward the sheriff or shout any abuses or profanity (R. 203). Mr. Givens was placed in the corridor where he assumed a sitting position against the corridor wall with knees to his chest, arms around his knees (R. 203).

Mrs. Weaver walked into room 214AA and looked around to see if there were any chairs. Not seeing any vacant chairs, Mrs. Weaver sat down with her back to the partition in room 214AA (R. 386-387, A-Ap. p. 130). She sat with her back close to the partition with her legs drawn up close to her body (R. 201, 322, 351; A-Ap. p. 131). Within seconds two members of the sheriff's department

ordered her to get up (R. 351, A-Ap. p. 130-131). Mrs. Weaver was wearing an insignia on her dress which read "FREEDOM NOW - CORE" (R. 387, A-Ap. p. 131). She never spoke a word while sitting (R. 201). In her sitting position she was arrested (R. 201). Mrs. Weaver never resisted her arrest (R. 201). She was placed in the corridor with her back to the corridor wall sitting with her legs drawn close to her body (R. 202). Mrs. Weaver, while sitting did not use any profanity or abusive language, never flailed or kicked or anything of that nature (R. 202).

Mrs. Johnson entered room 214AA and seeing no chairs in the waiting room she sat at the glass partition with her legs to the side and her back to the partition (R. 320, A-Ap. p. 131). She wore an insignia pinned on her dress which read "FREEDOM NOW - CORE" (R. 322, A-Ap. p. 132). Sergeant Reichert told her to get up or be arrested (R. 216). Mrs. Johnson remained mute and seated and was arrested. She never shouted any abuses or profanity, never attempted to resist or ward off the sheriff (R. 203). She was placed in the corridor with her back to the corridor wall and her legs drawn close to her body (R. 204).

After Mrs. Weaver and Mrs. Johnson had entered room 214AA the sheriff slid into the doorway to room 214AA preventing any more people from entering that room (R. 249, A-Ap. p. 132). Jerry Berndt tried to gain entrance to room 214AA and could not (R. 393, A-Ap. p. 132). He sat down in the corridor to the right of the door to room 214AA, legs akimbo (R. 394, A-Ap. p. 132). Miss Taylor sat down next to the corridor wall to the right of Mr. Berndt (R. 403, A-Ap. p. 133). The

remaining CORE demonstrators in the corridor did an about face and left the corridor area in a southerly direction (R. 271, A-Ap.p. 133).

The five defendants sat in the corridor against the corridor wall. Mrs. Johnson described a "sit-in" according to the Congress of Racial Equality Technique, "...when you are in the form of a protest, it is a form of demonstration at all times according to the CORE rules for action, if there are chairs available, these chairs will be taken. Where there are no chairs, where there is an overflow, the members then will sit on the floor with their knees drawn up to their chest, their backs protected by any nearby partition such as a wall, chair, table legs..." (R. 336-337, A-Ap. p. 133-134).

The five defendants sitting in the corridor did not engage in any boisterous, abusive, or profane language, or flail their arms around (R. 260). The five defendants were told by Sergeant Reichert to arise and leave the premises or walk in an orderly fashion or be arrested (R. 218). The defendants remained mute and seated and were arrested (R. 219).

The five defendants were charged with the crime of disorderly conduct on warrants alleging that they:

> ... on the 30th day of August A.D. 1963 in the County of Milwaukee, Wisconsin, did unlawfully engage in disorderly conduct under circumstances in which such conduct tended to cause and provoke a

disturbance, contrary to Section 947.01(1) of the Statutes, and against the peace and dignity of the State of Wisconsin.

An all white Milwaukee County Court jury found the defendants guilty of disorderly conduct and the County Court ordered the defendants to pay a fine of One Hundred and No/100 ($100.00) Dollars plus costs or serve a sentence of thirty days in jail. An all white Circuit Court jury after a trial de novo on appeal found the defendants guilty of disorderly conduct. The Circuit Court imposed the same fines as the County Court, to-wit: One Hundred and No/100 ($100.00) Dollars and costs (R. 412, A-Ap.p.134). The defense thereafter moved the Court that judgment be entered notwithstanding the verdict inasmuch as the jury verdict was contrary to the great weight of the evidence introduced at the trial. The Court denied the motion (R. 412, A-Ap.p. 134). The defense moved the Court for a new trial in the interest of justice in that the verdict was against the great weight of the evidence introduced at the trial. The Court denied this motion (R. 412, A-Ap.p. 135). Notice of Appeal from the Circuit Court decision was filed in the Wisconsin Supreme Court January 11, 1965, and the record filed in the Court January 20, 1965.

ARGUMENT

I. THE SHERIFF'S ORDERS AND INSTRUCTIONS GIVEN TO THE DEPUTY SHERIFFS ON THE DAY OF THE DEFENDANTS' ARRESTS CONSTITUTED (A) A PRIOR RESTRAINT ON DEFENDANTS' FREEDOMS OF SPEECH AND ASSEMBLY, AND THEIR RIGHT TO PETITION THEIR GOVERNMENT FOR REDRESS OF GRIEVANCES, AND (B) WERE A DENIAL OF THE EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT.

A.

The United States Supreme Court has made it clear that a State or Municipality can not "require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not be... disseminate [d]..." Cox v. State of Louisiana (January 18, 1965), 33 Law Week 4099, No. 24. For prior cases so holding see Lowell v. Griffin (1938), 303 U.S. 444, 58 S. Ct. 666, 82 L. Ed. 949; Hague v. C.I.O. (1939), 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423; Schneider v. State (1939), 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 155; Largent v. Texas (1943), 318 U.S. 418, 63 S. Ct. 667, 87 L. Ed. 873; Saia v. New York (1948), 334 U.S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574; Niemotko v. Maryland (1951), 340 U.S. 268, 71 S. Ct. 325, 95 L. Ed. 267; and Kunz v. New York (1951), 340 U.S. 290, 71 S. Ct. 312, 95 L. Ed. 280.

The Supreme Court in Cox v. State of Louisiana, supra at p. 4105 stated:

> "It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute."

In Niemotko v. Maryland, supra, the Supreme Court held that constitutional rights of freedom of speech and religion were violated by a State conviction of members of a religious group known as Jehovah's Witnesses on a charge of disorderly conduct. In that case the conviction was based, not upon evidence of disorder, threats of violence, or riot, but on the fact that the defendants had used a public park for Bible talks without a permit. Their application for a permit had been denied by municipal authorities in exercise of a power derived, not from a statute or ordinance, but from a local practice not defining any standards or limitations. The United States Supreme Court in Niemotko v. Maryland, supra at p. 271 stated:

> "...this court condemned statutes and ordinances which require that permits be obtained from local officials as a prerequisite to the use of public places, on the grounds that a license requirement constitutes a prior restraint on freedom

of speech, press and religion, and, in the absence of narrowly drawn, reasonable and definite standards for officials to follow, must be invalid."

In the instant case CORE demonstrators intended to utilize the public waiting room area 214AA to sit in chairs to peacefully petition their government for redress of grievances and to protest the refusal of an elected official to remove a personal appointment who had made remarks prejudicial to Negroes at a public hearing of a public body. The initial day of the demonstration CORE members had sat in chairs in the waiting room area 214AA and no arrests had ensued. The deputy sheriffs on that date did not prevent CORE demonstrators from entering the waiting room area 214AA. Two days later, the day these defendants were arrested, at least two deputy sheriffs were assigned to the door leading to room 214AA with orders from the sergeant in charge of their detail to allow only authorized personnel, press, radio, television representatives, and supervisors to use room 214AA, and also people who had appointments with supervisors or who sought an appointment (R. 190-191, 211, 223, A-Ap.p. 119-120). The deputy sheriffs were to determine in their discretion those who constituted authorized personnel and what constituted proper business without any further elaboration on the part of the sergeant issuing their orders. (R. 254, A-Ap.p. 121-122). Mr. Grobschmidt, the Chairman of the County Board of Supervisors against whom the demonstration was directed, admitted that normally sheriffs were not stationed outside room 214AA to question citizens as to whether they had business or authorization to enter room 214AA (R. 287, A-Ap.p. 122).

In this case there is no ordinance, statute, or amorphous practice regulating or prohibiting the use of public waiting room 214AA to citizens or requiring citizens to have a permit to enter the waiting room. On the contrary, the Chairman of the County Board of Supervisors stated that the normal procedure for seeing any member of the County Board, himself included, would be for a citizen to have unobstructed and unquestioned access through the door leading to room 214AA (R. 286-287, A-Ap. 122).

All that is present in the instant case is an "order or instruction", whereby all authority to grant permission for access to public waiting room area 214AA was vested in two deputy sheriffs. As the Supreme Court stated in Niemotko v. Maryland, supra at p. 272:

> "No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served."

The conclusion is inescapable that access to public waiting room area 214AA was denied only to CORE demonstrators. There was no valid reason for this denial. As the Supreme Court stated in Niemotko v. Maryland, supra at p. 272:

> "The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body."

And as the Court further stated:

> "It thus becomes apparent that the lack of standards in the license issuing 'practice' renders that 'practice' a prior restraint in contravention of the Fourteenth Amendment, and that the completely arbitrary and discriminatory refusal to grant the permits was a denial of equal protection." Supra at p. 273.

In Hague v. C.I.O. supra, the United States Supreme Court struck down a city ordinance which required a license from a local official for a public assembly on the streets or highways or in the public parks or public buildings. The official was empowered to refuse the permit if in his opinion the refusal would prevent "riots, disturbances, or disorderly assemblage." Supra at p. 516. The Supreme Court held the ordinance was void on its face because it could be made "the instrument of arbitrary suppression of views on national affairs." Supra at p. 516.

The United States Supreme Court in Saia v. New York, supra, struck down an ordinance which had the same effects as the ordinance in Hague v. C.I.O., supra. The Court stated:

> "The right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channel of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal. Unless we are to retreat from the firm position we

> have taken in the past, we must give freedom of speech in this case the same preferred treatment that we gave of freedom in religion in the Cantwell v. Connecticut case, freedom of the press in Lowell v. Griffin, and freedom of speech and assembly in the Hague v. C.I.O. case." At pp. 560-561.

Sit-ins are today recognized as effective instruments of public speech. Sitting-in peacefully to protest unjust discrimination in words, acts, laws, or social systems or to petition government for redress of grievances has become an accepted form of effective political protest. This is one way in which the voice of the people can be heard. As the Court pointed out in Saia v. New York, supra, any abuses created can be controlled by narrowly drawn statutes.

> "When a City allows an official to ban them /peaceful demonstrations/ in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas." Supra at p. 562.

Thus the convictions below vested the deputy sheriffs with "a device for suppression of free communication of ideas." This amounts to sanctioning a prior restraint of defendants' freedom of speech, assembly, and right to petition government for redress of grievances.

B.

The deputy sheriffs in this case applied their instructions and orders to deprive only CORE

members of entrance to room 214AA (R. 256-257). Therefore even if we assume the sheriff's orders and instructions were fair and impartial on their face, this case would fall into the category of cases that hold if the law is administered by public authority with an evil eye and unequal hand, so as practically to make illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. Yick Wo v. Hopkins (1886), 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220.

In Yick Wo v. Hopkins, supra, before anyone could engage in the laundry business within the corporate limits of the City and County of San Francisco, California, consent had to be obtained from the board of supervisors. The defendants in the case and two hundred others, all of whom happened to be Chinese, were denied this consent. Eighty others, not Chinese subjects, were permitted to carry on the same business under similar conditions.

In this case the deputy sheriffs denied CORE members entrance to room 214AA but all other members of the public, as well as all press personnel, were permitted to enter.

It is clear that only CORE members were denied access to room 214AA. As the Court stated in Yick Wo v. Hopkins, supra, at p. 374:

> "The discrimination is therefore illegal, and the public administration which enforces it is a denial of equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution."

Therefore, as the record in this case clearly shows, the sheriff's orders and instructions given to the deputy sheriffs constituted not only a prior restraint on defendants' First Amendment rights to freedom of speech and assembly, and to petition their government for redress of grievances, but they also constituted a denial of equal protection of the laws under the Fourteenth Amendment.

II. THE TRIAL COURT'S DENIAL OF DEFENSE MOTIONS FOR A NEW TRIAL WAS IMPROPER INASMUCH AS THE RECORD DOES NOT SHOW DEFENDANTS' CONDUCT (A) WAS DISORDERLY OR (B) TENDED TO CAUSE OR PROVOKE A DISTURBANCE OR (C) WAS A CLEAR AND PRESENT DANGER TO INDIVIDUALS OR PROPERTY AT THE TIME OF THE ARREST AND UNDER THE CONDITIONS THAT THEN PREVAILED, THESE FACTORS BEING NECESSARY ELEMENTS OF THE OFFENSE OF DISORDERLY CONDUCT WHEN SECTION 947.01(1) IS APPLIED TO DEMONSTRATIONS SEEKING SPECIFIC POLITICAL OBJECTIVES.

Wisconsin Statutes, Section 947.01(1) provides:

> 947.01. Disorderly Conduct. Whoever does any of the following may be fined not more than $100 or imprisoned not more than 30 days:
>
> (1) In a public or private place, engages in violent, abusive, indecent, profane boisterous, unreasonably loud, or otherwise

disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance; . . .

The United States Supreme Court has not upheld convictions of individuals charged with breach of the peace of disorderly conduct where the evidence showed no more than that the opinions they were peacefully expressing might be unpopular in the community or to certain public officials. See Cox v. State of Louisiana (1965), 33 Law Week 4099, No. 24; Fields v. South Carolina (1963), 375 U.S. 44, 84 S.Ct. 150, 11 L.Ed. 2d 107; City of Rock Hill v. Henry (1963), 375 U.S. 6, 84, S.Ct. 44, 11 L.Ed 2d 38; Edwards v. South Carolina (1963), 372 U.S. 229, 83 S.Ct. 679, 9 L.Ed. 2d 697.

In Edwards v. South Carolina, supra, one hundred eighty-seven Negroes marched to the South Carolina State House grounds to protest segregation. Already on the State House grounds were thirty or more law enforcement officers who had advance knowledge the demonstrators were coming. A crowd numbering two hundred to three hundred onlookers who had gathered in the area was only curious. There was no evidence of any threatening remarks, hostile gestures, or offensive language on the part of any members of the crowd. There was no obstruction of pedestrian or vehicular traffic within the State House grounds. Police protection at the scene was at all times sufficient to meet any foreseeable disorder. Police in this situation advised the demonstrators to disperse within fifteen minutes and, when they did not, all were arrested.

The Supreme Court of South Carolina in affirming the judgments in Edwards v. South Carolina, supra, said that under the law of that state the offense of breach of the peace "is not susceptible of exact definition," but that the "general definition of the offense" is as follows:

> "In general terms a breach of the peace is a violation of public order, a disturbance of the public tranquility, by an act or conduct inciting to violence..., it includes any violation of any law enacted to preserve peace and good order. It may consist of an act of violence or an act likely to produce violence. It is not necessary that the peace be actually broken to lay the foundation for a prosecution for this offense. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required. Nor is actual personal violence an essential element in the offense...
>
> By 'peace', as used in the law in this connection, is meant the tranquility enjoyed by citizens of a municipality or community where good order reigns among its members, which is the natural right of all persons in political society." -S.C.-, 123 S.E.2d, at 249.

The United States Supreme Court held the demonstrators were convicted of an offense so general as to be in the words of the South Carolina Supreme Court "not susceptible of exact definition." And they were convicted upon evidence which showed only that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd

and necessitate police protection. The United States Supreme Court reversed the finding of guilt.

In Fields v. South Carolina, supra, 249 Negroes participated in an antisegregation parade and were convicted of breach of the peace. The United States Supreme Court reversed the conviction citing Edwards v. South Carolina, supra.

In City of Rock Hill v. Henry, supra, 65 Negroes were convicted of breach of the peace when the South Carolina Supreme Court found that their loud and boisterous singing during a demonstration had caused crowds to gather in the streets and tensions to develop in the community, and had disrupted work in the City Hall. The United States Supreme Court reversed the convictions declaring that the decisions in Edwards v. South Carolina, supra, controlled this case.

In Cox v. Louisiana, supra, the Louisiana Supreme Court found the leader of 1500 to 2000 students who had assembled at the Old State Capitol Building to protest segregation guilty of disturbing the peace. The United States Supreme Court again reversed the convictions citing Edwards v. South Carolina, supra, and Fields v. South Carolina, supra.

In the instant case, members of Milwaukee CORE met at the Milwaukee County Courthouse on the morning of August 30, 1963, to protest peacefully the refusal of the Chairman of the Milwaukee County Board of Supervisors to remove a personal appointment who had made prejudicial statements at a public meeting of a public body (R. 277, 318, 322, 373-374, 383, 390, 398, and 402-403, A-Ap. pp. 111, 126, 127.)

There were a number of law enforcement officials already at the Milwaukee County Courthouse when the CORE demonstrators arrived. More sheriffs were available had the need arisen for their services (R. 172-173, 190-191, 210-211, 225). There were news reporters, television men, photographers, and a few Supervisors present during the demonstration (R. 174, 179, 197, 260). The record does not indicate the presence of any crowd or the presence of any courthouse personnel who worked in the demonstration area at the time of defendants' arrests.

The statements of all witnesses testifying in the case indicate that none of the defendants' language and conduct was loud, boisterous, abusive, profane, or violent. In fact, none of the defendants spoke a word (R. 201, 202, 203, 260, 368-369). There is no evidence that the defendants obstructed pedestrian or vehicular traffic while picketing outside the courthouse or when engaged in their "sit-in" inside the courthouse. A deputy sheriff testified that defendant Givens in fact did not impede access to the County Board Chairman's office and did not have his legs sticking out into the office or waiting room area while engaged in his peaceful protest (R. 203, 206). The only evidence in this record of any disturbance that could, even arguably, constitute evidence of disorderly conduct by the defendants is the uncorroborated statement of Grobschmidt improperly allowed over defense counsel's objection that the activities of those who sat down in his inner office interfered with office practice (R. 282). Not only was this question speculative and calling for a conclusion from the witness, but the question assumed facts not in

evidence. A sheriff and Grobschmidt stated the defendants were orderly during the conference in Grobschmidt's office (R. 175, 195). The State did not introduce any office workers or any other witnesses to testify that they had been disturbed, or could not do their work, or that their office practice had been interfered with by the activities of the defendants who sat down in Mr. Grobschmidt's inner office. The conduct of the defendants in the outside corridor clearly could not have interfered with the office practice in Mr. Grobschmidt's inner office. There was no evidence that the onlookers to the demonstration were anything but curious or engaging in their rights as guaranteed by a free press. There was no evidence of any threatening remarks, hostile gestures, or offensive language on the part of the onlookers to the peaceful demonstration.

The record in this case shows no more than that the opinions which the CORE demonstrators were peacefully expressing were sufficiently opposed to the views of some community office holders. Conceding this to be the nature of the demonstration, the "compelling answer...is that constitutional rights may not be denied simply because of hostility to their assertion or exercise." Watson v. Memphis (1963), 373 U.S. 526 at p. 535, 83 S.Ct. 1314, L.Ed 2d 529.

No where in our record is there any evidence of disorderly conduct or conduct tending to cause or provoke a disturbance. Not one witness testified to an actual disturbance in the arresting area or that he was disturbed or tended to be disturbed by the defendants' conduct. The defendants peacefully sat in the public waiting room area and the

corridor adjacent to the public waiting room area and adjacent to Grobschmidt's private office to petition their government for redress of a specific grievance. Defendants' "communication considered in the light of the constitutional guarantees, raised no clear and present menace to public peace and order as to render them liable to conviction of the offense in question." Cantwell v. Connecticut, (1940), 310 U.S. 296, 311, 60 S.Ct. 900, 84 L.Ed 1213; cf. Thornhill v. Alabama (1940), 310 U.S. 88, 105-106, 60 S. Ct. 736, 84 L.Ed. 1093.

The criminal convictions in this case, as in Edwards v. South Carolina, supra, and Cox v. Louisiana, supra, did not result from the even-handed application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. The trial court at one point in the trial proceedings addressed one defendant and stated: "Let the record indicate that the complaint on file with this Court is as follows: 'Edward Marlowe, being first duly sworn on oath, complains to the County Court of the County of Milwaukee, Misdemeanor Branch, that Arlene K. Johnson, on the 30th day of August, 1963, in the County of Milwaukee, did unlawfully engage in disorderly conduct.' " (R. 334). The trial court continued: "From that point on there is no specific time alleged in the complaints as to when the disorderly conduct did exist on the 30th day of August." (R. 335). These defendants were convicted of an offense so general as to be in the words of the trial court "impossible to say with accuracy just what may be considered 'in law' as amounting to disorderly conduct..." (R. 418). The trial court then defined the term "disorderly conduct" as "to embrace all such acts and such conduct

as are of a nature to corrupt the public morals or to outrage the sense of public decency, whether committed by words or acts" (R. 418). To apply this definition in the instant case would proscribe the expression of unpopular political views as corrupting public morals or outraging decency.

As the Court stated in Cox v. Louisiana, supra at p. 4103:

> "The Louisiana statute, as interpreted by the Louisiana court, is at least as likely to allow conviction for innocent speech as was the charge of the trial judge in Terminelle v. Chicago (1949), 337 U.S. 1, at pp. 4-5, 69 S.Ct. 894, 93 L.Ed. 1131."

As the United States Supreme Court said in Hague v. C.I.O. (1939), 307 U.S. 496, 516, 59 S.Ct. 954, 85 L.Ed. 1423:

> "...uncontrolled suppression of the privilege of free speech cannot be made a substitute for the duty to maintain order in connection with the exercise of the right."

> "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech and assembly." Whitney v. California (1927), 274 U.S. 357, 378, 47 S.Ct. 641, 71 L.Ed. 1095, Mr. Justice Brandeis concurring.

The proper course of action for the deputy sheriffs in this case was to allow CORE members access to room 214AA and to allow them to sit in

chairs in waiting room area 214AA. If the courthouse personnel working in the area then complained that the presence of CORE members prevented their working, the deputy sheriffs might have had cause to apprehend the CORE people. In this case the facts indicate that the deputy sheriffs prevented CORE members from peacefully demonstrating and continuing their protest. Uncontrolled suppression of the right of free speech was substituted for the duty to maintain order.

The United States Supreme Court has stated that the right of peaceful assembly is a right cognate to those of free speech and free press and equally fundamental. DeJonge v. Oregon (1937), 299 U.S. 353, 57 S.Ct. 255, 81 L.ED. 278; Cantwell v. Connecticut (1940), 310 U.S. 296, 308, 60 S.Ct. 900, 84 L.Ed. 1213; and Thomas v. Collins (1945), 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430.

Under the circumstances in this case the interests of the State of Wisconsin were insufficient to justify restriction of freedom of speech and assembly. The United States Supreme Court has upheld the right to free speech in circumstances far more incendiary. Terminelle v. Chicago, supra; Hague v. C.I.O., supra; Kunz v. New York (1951), 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280; Cf. Sellers v. Johnson, 163 F.2d 877 (8th Circ. 1947) cert. denied (1948), 332 U.S. 851, 68 S.Ct. 355, 92 L.Ed. 421; Rockwell v. Morris, 10 N.Y. 2d 721, 176 N.E. 2d 836 (1961) cert. denied (1961), 368 U.S. 913, 82 S.Ct. 189, 7 L.Ed. 2d 131.

The liberty secured by the due process clause of the Fourteenth Amendment insofar as it protects free expression is not limited only to verbal

utterances. The right comprehends picketing, Thornhill v. Alabama, supra; free distribution of handbills, Martin v. Struthers (1943), 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313; display of motion pictures, Burstyn v. Wilson (1952), 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098; the display of a flag or symbol, Stromberg v. California (1931), 283 U.S. 359, 515 S.Ct. 532, 75 L. Ed. 1117; joining of associations, NAACP v. Alabama (1958), 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 1488. What has become known as a "sit-in" is a different but obviously well understood symbol, a meaningful method of communication and protest.

Because this case involves a sweeping disorderly conduct law and freedom of expression is involved, Mr. Justice Harlan's warning as to all inclusive breach of the peace provisions is most timely:

> "But when a State seeks to subject to criminal sanctions conduct which, except for a demonstrated State interest, would be within the range of freedom of expression as assured by the Fourteenth Amendment, it cannot do so by means of a general and all-inclusive breach of the peace prohibition. It must bring the activity sought to be proscribed within the ambit of a statute or clause narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." Garner v. Louisiana (1961), 368 U.S. 157, 202, 82 S.Ct. 248, 7 L.Ed. 2d 207.

The State in the instant case clearly has subjected to criminal sanctions conduct which is within

the range of freedom of expression as assured by the First and Fourteenth Amendments; the means used is a general and all-inclusive disorderly conduct prohibition. The State has not shown defendants' conduct to constitute a clear and present danger to individuals or property at the time of their arrest and under the conditions that then prevailed. The State has further failed to produce evidence that defendants' conduct was disorderly or tended to cause or provoke a disturbance.

III. DEFENDANTS WERE CONVICTED OF A CRIME UNDER THE PROVISIONS OF A STATE STATUTE WHICH, AS APPLIED TO THEIR ACTS, IS SO VAGUE, INDEFINITE, AND UNCERTAIN AS TO OFFEND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The due process clause of the Fourteenth Amendment requires that criminal statutes be sufficiently explicit to inform those who are subject to them what conduct on their part will render them criminally liable. "All are entitled to be informed as to what the State commands or forbids." Lanzetta v. N. J. (1939), 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888, and cases cited therein in note 2.

Wisconsin Statutes Section 947.01(1) as applied to these defendants has been so expanded that it does not give a fair and effective warning of the acts it now prohibits. Rather, by expansive interpretation, the Statute now reaches more than its words fairly and effectively define, and applied it therefore offends the principle that criminal

laws must give fair and effective notice of the acts they prohibit.

Wisconsin Statutes Section 947.01(1), reads as follows:

> 947.01(1). Disorderly Conduct. Whoever does any of the following may be fined not more than 30 days:
>
> (1) In a public or private place, engage in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance; ...

Construing and applying Federal Statutes the United States Supreme Court has long adhered to the principle expressed in Pierce v. U.S. (1941), 314 U.S. 306, 311, 62 S.Ct. 237, 86 L.Ed. 226: "... judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." Cf. Lanzetta v. N.J., supra at 306 U.S. 174, 176-177: "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (cf. U.S. v. L. Cohen Grocery Co. (1921), 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516) may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to with hold. That

would be making an act criminal without fair and effective notice." Cf. Herndon v. Lowry (1937) 301 U.S. 242, 575 S.Ct. 705, 81 L.Ed. 1066.

The United States Supreme Court applied similar principles in McBoyle v. U.S. (1931), 283 U.S. 25, 51 S.Ct. 340, 75 L.Ed. 816; U.S. v. Weitzel (1918), 246 U.S. 533, 38 S.Ct. 381, 62 L.Ed. 872; and U.S. v. Wiltberger, 18 U.S. 76, 5 Wheat. 37. Throughout these cases runs a uniform application of the rule expressed by Mr. Chief Justice Marshall:

> "It would be dangerous, indeed, to carry the principles, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated." Id. 18 U.S. (5Wheat.) at p. 96.

The cases discussed above involved Federal statutes. The United States Supreme Court applied to said statutes a rule of construction incorporating the constitutional requirement of fair and effective notice. Pierce v. U.S., supra, opinion cited for comparison Lanzetta v. N.J., supra, and "cases cited therein" while U.S. v. Cardiff, supra, mentions U.S. v. L. Cohen Grocery Co., supra, and Herndon v. Lowry, supra.

Defendants do not argue for an unreasonable degree of specificity in legislative drafting. However in its instruction to the jury the trial court converted the common English words "or otherwise disorderly conduct" into an omnibus catch-all phrase thereby transforming the statute into a law

which fails to apprise those subject to it "in language that the common man will understand, of what the law intends to do if a certain line is passed." McBoyle v. U.S., supra.

Judicial construction often has cured criminal statutes of the vice of vagueness, but this has been construction which confines, not expands, statutory language. Cf. Chaplinsky v. N.H. (1942), 315 U. S. 568, 62 S.Ct. 766, 86 L.Ed. 1031, with Herndon v. Lowry, supra.

As construed and applied herein, the law in question no longer informs one what is forbidden in fair terms. This failure offends the standard of fairness expressed by the rule against construction of criminal laws embodied in the due process clause of the Fourteenth Amendment.

CONCLUSION

The defendants-appellants submit that the sheriff's instructions and orders as given to the deputy sheriffs on the day of defendants' arrests constituted a prior restraint on their freedoms of speech and assembly, and their right to petition government for redress of grievances, and denied their rights to equal protection of the laws under the Fourteenth Amendment; that the trial court's denial of defense motions for a new trial was improper inasmuch as the record does not show defendants' conduct violated the necessary elements of Wisconsin Statutes Section 947.01(1) to sustain the convictions, and that the defendants were convicted of a crime under the provisions of a state statute which, as applied to their acts, is so vague, indefinite, and uncertain as to offend the due process clause of the Fourteenth Amendment. In the interest of justice based upon the facts, the record and inferences drawn therefrom, the defendants-appellants,rights were violated and the judgment below should be vacated.

Respectfully submitted,

Barbee & Jacobson
Attorneys for Defendants-
Appellants.

DEFENDANTS-APPELLANTS' APPENDIX

JW
CE
AK
MT
JH

JWB	7
CEW	24
AKJ	64
MT	78
JHG	96

CRIMINAL WARRANT
(Formal Parts Omitted)

The State of Wisconsin, to the sheriff, or any Constable of said County, or any Police Officer of the City of Milwaukee:

WHEREAS, Edwin Marlowe has this day complained in writing to the County Court of said County of Milwaukee, on oath, that

JOHN H. GIVENS
CLARA E. WEAVER
MARCELLINE TAYLOR
ARLENE K. JOHNSON
JERRY W. BERNDT

on the 30th day of August, A.D. 1963, in the County of Milwaukee, Wisconsin, did unlawfully engage in disorderly conduct under circumstances in which such conduct tended to cause and provoke a disturbance, contrary to section 947.01(1) of the statutes, and against the peace and dignity of the State of Wisconsin, and prayed that the said

JOHN H. GIVENS
CLARA E. WEAVER
MARCELLINE TAYLOR
ARLENE K. JOHNSON
JERRY W. BERNDT

might be arrested and dealt with according to law.

NOW, THEREFORE, in the name of the State of Wisconsin, you are commanded forthwith to apprehend the said

JOHN H. GIVENS
CLARA E. WEAVER
MARCELLINE TAYLOR
ARLENE K. JOHNSON
JERRY W. BERNDT

and bring him before the said County Court to be dealt with according to law.

WITNESS, the Honorable CHRIST T. SERAPHIM, County Judge of the County of Milwaukee, the 30 day of August in the year of our Lord One Thousand Nine Hundred and Sixty Three.

/s/ Raymond W. Fleming
Chief Deputy Clerk of Courts, Criminal-Misdemeanor-Traffic Divisions

By /s/ Bernie Sullivan
Deputy

JWB 5
CEW 22
AKJ 62
MT 76
JHG 94

CRIMINAL COMPLAINT
(Formal Parts Omitted)

EDWIN MARLOWE, being first duly sworn on oath, complains to the County Court of the County of Milwaukee, Misdemeanor Branch, that JERRY W. BERNDT, ARLENE K. JOHNSON, MARCELLINE TAYLOR, CLARA E. WEAVER and JOHN H. GIVENS on the 30th day of August A.D. 1963, in the County of Milwaukee, Wisconsin, did unlawfully engage in disorderly conduct under circumstances in which such conduct tended to cause and provoke a disturbance, contrary to Section 947.01(1) of the statutes, and against the peace and dignity of the State of Wisconsin, and prays that the said JERRY W. BERNDT, ARLENE K. JOHNSON, MARCELLINE TAYLOR, CLARA E. WEAVER and JOHN H. GIVENS may be arrested and dealt with according to law.

/s/ Edwin Marlowe

35 MOTION TO SEVER
(Formal Parts Omitted)

Now come the Defendants, JERRY BERNDT, CLARA E. WEAVER, ALENE K. JOHNSON, MARCELLINE TAYLOR, and PATRICIA HAYNES, and by their Attorney, LLOYD A. BARBEE, to move this Court for an order severing or separating Defendants JERRY BERNDT, MARCELLINE TAYLOR, and PATRICIA HAYNES from CLARA E. WEAVER and ARLENE K. JOHNSON upon the grounds that their arrest did not arise out of the same transaction; that their arrest was not made at the same place, nor was it made at the same time, and the facts and circumstances surrounding their arrest are not precisely identical enough to safeguard a fair trial for all, if their trial remains consolidated.

Dated at Milwaukee, Wisconsin this 3rd day of March, 1964.

/s/ Lloyd A. Barbee
LLOYD A. BARBEE
Defendants' Attorney

BARBEE & JACOBSON

42 MOTION FOR BILL OF PARTICULARS
132 (Formal Parts Omitted)

Comes now the defendants JERRY BERNDT, CLARA E. WEAVER, ARLENE K. JOHNSON, & MARCELLINE TAYLOR, and by their attorney LLOYD A. BARBEE, moves this court upon the grounds stated in the attached affidavit and upon

all the files, records and proceedings had herein, for an order directing the District Attorney for Milwaukee County to serve and file a Bill of Particulars of the Complaint, a true and correct copy of which is hereto attached, particularly setting forth the following:

1. The exact place at which the alleged act or acts of disorderly conduct are alleged to have been made.

2. The specific act or acts upon which the outcome of the alleged disorderly conduct is alleged to have been determined.

3. The exact time at which the alleged act or acts of disorderly conduct are alleged to have been made.

And for such other and further relief as to the Court may deem proper.

Dated at Milwaukee, Wisconsin, this 3rd day of March, 1964.

/s/ Lloyd A. Barbee
BARBEE & JACOBSON
Defendants' Attorneys

38-39 MOTION TO DISMISS
140-141 (Formal Parts Omitted)

Now comes the Defendant in the above entitled action and moves to dismiss, and for grounds to dismiss says:

1. The Defendant was arrested August 30, 1963, pursuant to warrants sworn out by Edwin Marlowe and issued in accordance with the provisions of the Wisconsin Statutes, 947.01(1), which provides:

> 947.01(1) In a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance ...

2. That said statute, Section 947.01(1), Wisconsin Statutes, is unconstitutionally vague on its face and as applied and violates the due process clause of the Wisconsin Constitution, Article 1, Section 7, and the due process clause of the 14th Amendment to the Constitution of the United States.

3. That the said warrants violate the right of the Defendant to speak freely and assemble and petition for redress of grievances in violation of Article 1, Section 3 and Article 1, Section 4 of the Wisconsin Constitution, and the due process clause of the 14th Amendment to the Constitution of the United States.

4. That said Section 947.01(1), Wisconsin Statutes, is so vague that Defendant is not put on notice as to what act he has allegedly committed, rendering it impossible to answer the charge or make a legal defense, thus denying the Defendant due process of law secured to him by the 14th Amendment to the Constitution of the United States.

all the files, records and proceedings had herein, for an order directing the District Attorney for Milwaukee County to serve and file a Bill of Particulars of the Complaint, a true and correct copy of which is hereto attached, particularly setting forth the following:

1. The exact place at which the alleged act or acts of disorderly conduct are alleged to have been made.

2. The specific act or acts upon which the outcome of the alleged disorderly conduct is alleged to have been determined.

3. The exact time at which the alleged act or acts of disorderly conduct are alleged to have been made.

And for such other and further relief as to the Court may deem proper.

Dated at Milwaukee, Wisconsin, this 3rd day of March, 1964.

/s/ Lloyd A. Barbee
BARBEE & JACOBSON
Defendants' Attorneys

38-39 MOTION TO DISMISS
140-141 (Formal Parts Omitted)

Now comes the Defendant in the above entitled action and moves to dismiss, and for grounds to dismiss says:

1. The Defendant was arrested August 30, 1963, pursuant to warrants sworn out by Edwin Marlowe and issued in accordance with the provisions of the Wisconsin Statutes, 947.01(1), which provides:

> 947.01(1) In a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance ...

2. That said statute, Section 947.01(1), Wisconsin Statutes, is unconstitutionally vague on its face and as applied and violates the due process clause of the Wisconsin Constitution, Article 1, Section 7, and the due process clause of the 14th Amendment to the Constitution of the United States.

3. That the said warrants violate the right of the Defendant to speak freely and assemble and petition for redress of grievances in violation of Article 1, Section 3 and Article 1, Section 4 of the Wisconsin Constitution, and the due process clause of the 14th Amendment to the Constitution of the United States.

4. That said Section 947.01(1), Wisconsin Statutes, is so vague that Defendant is not put on notice as to what act he has allegedly committed, rendering it impossible to answer the charge or make a legal defense, thus denying the Defendant due process of law secured to him by the 14th Amendment to the Constitution of the United States.

5. That the said warrants are vague, indefinite, and does not apprise the Defendant of the act or acts he allegedly committed leading to the issuance of the warrant and to his arrest and violates the due process clause of the 14th Amendment to the Constitution of the United States.

6. That the issuance of the warrant and the arrest violates Defendant's rights of freedom of speech, assembly and petition for redress of grievances under the 1st and 14th Amendments to the Constitution of the United States.

7. That the statute has been unconstitutionally applied to this Defendant in violation of the equal protection clause of the 14th Amendment.

8. That there is no evidence of any action on the part of the Defendant which is sufficient to justify the issuance of the disorderly conduct complaint or his arrest and therefore Defendant has been denied due process of law under the 14th Amendment to the Constitution of the United States.

Dated at Milwaukee, Wisconsin, this 3rd day of March, 1964.

/s/ Thomas M. Jacobson
Thomas M. Jacobson
Barbee & Jacobson
Attorneys for Defendant.

147 REQUESTED INSTRUCTIONS #1
(Formal Parts Omitted)

Disorderly conduct is defined in Section 947.01(1) of the Wisconsin statutes as follows:

"Whoever . . . in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise

disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance."

The words of the statute must be read in the disjunctive; that is they make it an offense to use such language of the character described in the statute or to engage in disorderly conduct tending to cause or provoke a disturbance.

While it is impossible to state with accuracy just what may be considered in law as amounting to disorderly conduct, the term is usually held to embrace all such acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, whether committed by words or acts. Teske v. State, 256 Wis. 440.

Respectfully submitted,

WILLIAM J. McCAULEY
DISTRICT ATTORNEY MILWAUKEE COUNTY

By JAMES J. MURPHY
ASSISTANT DISTRICT ATTORNEY

Attorneys for Plaintiff.

157 DEFENDANTS' REQUESTED INSTRUCTIONS
(Formal Parts Omitted)

You are instructed that Wisconsin Statutes, 947.01(1) provides as follows:

"Whoever does any of the following may be fined not more than $100 or imprisoned not more than 30 days:

(1) In a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such

conduct tends to cause or provoke a disturbance; ..."

The words "or otherwise disorderly conduct" in this statute mean conduct of the same kind or nature as described in the preceding clauses of the statute; which is to say, violent, abusive, indecent, profane, boisterous, unreasonably loud, conduct under circumstances in which such conduct tends to cause or provoke a disturbance.

BARBEE & JACOBSON

429 STIPULATION WITH REFERENCE TO APPROVAL OF TRANSCRIPT (Formal Parts Omitted)

IT IS HEREBY STIPULATED by and between the respective parties BARBEE & JACOBSON and THOMAS M. JACOBSON, appearing on behalf of the Defendants-Appellants, and HUGH R. O'CONNELL, appearing on behalf of the Plaintiff-Respondent, that service of a proposed approval of Transcript in the above entitled action is hereby waived and that the foregoing transcript of testimony contains all of the testimony and evidence introduced upon the trial of the action, the decision of the trial court announced orally in open court, and argument upon the Defendants-Appellants' motion for a new trial.

IT IS FURTHER STIPULATED that the foregoing Approval of Transcript may be signed and settled by the trial Judge without further notice to any of the parties.

Dated at Milwaukee, Wisconsin, this 14th day of January, 1965.

BARBEE & JACOBSON
By: Thomas M. Jacobson

HUGH R. O'CONNELL
By: _____

CERTIFICATE

And because the foregoing evidence, rulings, instructions, exhibits and exceptions do not appear of record, I, the undersigned, the judge who tried said action, and due motion of the signing and settling of the transcript having been waived, do settle and sign this Approval of Transcript to the end that the same may be part of the record herein this 14th day of January, 1965, and I certify that the above and foregoing transcript contains all of the evidence taken, offered, or received on the trial of said action and includes all of the testimony taken, offered, or received on said trial and includes all of the exhibits received on said trial.

Dated this 14th day of January, 1965.

/s/ JOHN COFFEY
CIRCUIT JUDGE

TESTIMONY

A. Trial Testimony before Honorable John L. Coffey, Circuit Court Judge in and for Milwaukee County, May 25, 26, 27, 1964.

Mr. James Murphy, Assistant District Attorney, appeared for the State of Wisconsin.

Mr. Thomas M. Jacobson and Mr. Lloyd A. Barbee appeared for the defendants.

Defendants Berndt, Johnson, Taylor, Weaver, and Givens were present in Court.

ARGUMENT ON EXCLUSION OF NEGROES FROM JURY

169 MR. JACOBSON: Prior to the Jury being impaneled, I would like to make a motion.

COURT: Prior to their being empaneled? Let's make it in chambers.

MR. JACOBSON: We would like to move for a dismissal -- a mistrial on the basis that the State has stricken from the Jury on its four pre-emptory challenges all four Negroes on the Jury panel.

We feel this shows prejudice on the part of the State and denies our defendants particularly on
170 the facts in this case, due process as well as equal protection clause of the constitution.

COURT: Mr. Murphy.

MR. MURPHY: The State has available to it four pre-emptory challenges. The word "pre-emptory" controls. As a representative of the State I may select or putting it another way, reject any four prospective jurors whom I think will not be able to assist the Jury in reaching a fair and impartial verdict and I need not state my grounds for my four challenges.

I, of course, deny it was done in any sense because of prejudice towards the individual jurors or the Negro community as a whole.

COURT: All right. The said motion is denied by the Court.

MR. JACOBSON: May I get on the record that the panel totaled four Negroes. That four Negroes were stricken and that the organization that the defendants are part of is a Congress of Racial Equality which is a Civil Rights organization.

170 It is on this basis that the defendant has made the motion for a mistrial. That Negroes were stricken on the basis of prior prejudice and not because they themselves have prior prejudice.

EUGENE GROBSCHMIDT sworn in:

DIRECT EXAMINATION
BY MR. MURPHY:

277 MR. MURPHY: Mr. Fred Lins are you referring to?

MR. GROBSCHMIDT: Yes.

Q. Was he an appointee of yours?

A. Yes, he was.

Q. To something I believe that was referred to as the Social Development Commission?

A. Yes, that was a commission organized by the Common Council of the City of Milwaukee in which the County Board appointed one to that commission.

Q. As County Board Chairman you personally made that appointment?

A. I did.

ARLENE K. JOHNSON sworn in:

REDIRECT EXAMINATION
BY MR. BARBEE:

322 MR. BARBEE: Do you know what the Social Development Commission was designed to do?

323 MRS. JOHNSON: Well, as I understand it the Social Development Commission is set up to handle inner city problems. This is one of their functions.

They will be and are dealing very closely with the minority races in Milwaukee County.

JOHN H. GIVENS sworn in:

DIRECT EXAMINATION
BY MR. BARBEE:

366 MR. BARBEE: Had you discussed your grievance with Chairman Grobschmidt when you met him on the morning of August 30th, 1963?

MR. GIVENS: Yes, sir.

Q. What did you tell him was the nature of your grievance?

A. Well, we had several news clippings and it was read to him, the comments, the remarks that Mr. Lins had made at a subcommittee hearing of the Social Development Commission which were some ways to be found to stop the ignorant, poor from coming to Milwaukee, you can't blame all the Negroes, they all look so

much alike, you never know which one committed the crime and an awful mess of them had an I.Q. of nothing.

ALVIN M. STROIKA, sworn in:

CROSS EXAMINATION
BY MR. JACOBSON:

198 MR. JACOBSON: You don't know if it is used as a public waiting room or not, do you?

DEP. STROIKA: We were told that day and the day previously, yes, sir.

DANIEL R. KENNEY sworn in:

DIRECT EXAMINATION
BY MR. BARBEE:

348 MR. BARBEE: In view of your experience in covering the activities of Room 214AA, do you know what the room is used for normally?

MR. KENNEY: Yes.

Q. What is it?

A. Well, I can best describe it as a multi-purpose room. I have seen it used for any number of reasons. Primarily, as a recess area for county supervisors during their regularly scheduled committee and county board meetings.

Q. Did you ever observe any drinking of coffee and playing sheepshead in Room 214AA?

349 MR. MURPHY Same objection.

COURT: He may answer.

A. Yes, I have.

Q. By whom?

A. By supervisors and visitors to the area.

ALVIN STROIKA sworn in:

CROSS EXAMINATION
BY MR. JACOBSON:

209 MR. JACOBSON: Were you present on the 28th now in this area around 214AA, you were weren't you?

DEP. STROIKA: I was in that area, yes.

Q. Did you see members of CORE sitting in chairs in room 214AA on that day?

A. Yes, I did.

DANIEL R. KENNEY
DIRECT EXAMINATION
BY MR. BARBEE:

346 MR. BARBEE: How many chairs normally are there?

MR. KENNEY: Well, the number varies that week. Previously to that week there had been as many as six chairs in that particular area.

Q. That is in addition to the secretary's chair?

A. That is correct, in addition to the chairs normally used by the personnel in the office.

Q. About what time during that week had you observed these six chairs?

A. Wednesday was the first day that I actually counted them. Wednesday that week.

Q. What caused you to count them then?

346 A. A demonstration, when I arrived in the office on Wednesday morning I found several members of CORE seated in this particular area.

COURT: Do you know what date it was, on a Wednesday?

A. That would be on the 28th.

COURT: The 28th?

A. That is correct.

COURT: Of August, 1963?

A. That is correct.

347 Q. Were they sitting in those chairs?

A. Yes, they were.

ALVIN STROIKA
CROSS EXAMINATION
BY MR. JACOBSON:

208 MR. JACOBSON: Now you were there at the time these CORE members sat down in the corridor on the 29th, weren't you?

DEP. STROIKA: I was in the corridor when arrests were made.

Q. Outside of Room 214AA, is that correct?

A. Yes, sir.

DEP. STROIKA: Yes, sir. I was present when several CORE demonstrators were arrested in the corridor outside.

Q. What conduct were they engaging in that you stated was a disturbance?

A. They were sitting in the corridor.

Q. Do you know where they sat in the corridor ?

MR. MURPHY: Objection, calling for speculation.

COURT: Do you know why?

A. Not really in essence. Except they were demonstrating.

COURT: All right. The objection is upheld.

Q. As a matter of fact these CORE persons sitting in the corridor attempted to gain entrance to Room 214AA, is that correct on that day?

A. They may have, I think they did, yes.

MR. MURPHY: Object to answer based on his thoughts.

COURT: Do you or don't you know? If you don't know say you don't know. If you do know, say you do know.

A. I don't know on that score, no.

SGT. HARRY REICHERT sworn in:

DIRECT EXAMINATION
BY MR. MURPHY:

210 MR. MURPHY: Were you in charge of a specially assigned group of deputy sherriffs on that day?

SGT. REICHERT: I was assigned to the Courthouse with deputies who normally work for me.

Q. Who were those deputies?

A. Deputy Stroika.

Q. Go on.

211 A. Deputy Jarvis Rowland, Deputy Sylvester Sobecke, Deputy Robert Bialk, Deputy Edwin

ALVIN STROIKA
CROSS EXAMINATION
BY MR. JACOBSON:

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Q. Who were those deputies?

A. Deputy Stroika.

Q. Go on.

211 A. Deputy Jarvis Rowland, Deputy Sylvester Sobecke, Deputy Robert Bialk, Deputy Edwin

Marlowe, Deputy Russell Tank, Deputy Francis Hanson. I believe he was there that day.

Q. Was there -- was this their usual assignment?

A. No, sir.

Q. A special task force then?

A. It was a special assignment, yes.

CROSS EXAMINATION
BY MR. JACOBSON:

225 MR. JACOBSON: Now when you stated that the other deputies, that is Tank and Hanson, they were on standby, what does that mean?

SGT. REICHERT: Well they were available and if there would have been any need to call for additional men, we'd probably have other men on a standby basis at the Safety Building.

ALVIN STROIKA
DIRECT EXAMINATION
BY MR. MURPHY:

173 MR. MURPHY: At about what time did you arrive in that area to commence performing your services on that day?

DEP. STROIKA: We were there at approximately 8 a.m.

DEP. STROIKA: It was the inner west corridor, mainly the corridor that opens into the Committee Clerk's Office and supervisor's room.

Q. Were there other deputies assigned to duty in that general area?

A. Yes, sir, there were.

CROSS EXAMINATION
BY MR. JACOBSON:

190 MR. JACOBSON: You stated that you on the morning, you were given an assignment for the morning of August 30th, 1963 to go to the second floor of the Courthouse, is that correct?

DEP. STROIKA: Yes, sir.

Q. When was the initial date you were given that assignment?

A. I think it was given to us the night before.

SGT. REICHERT
CROSS EXAMINATION
BY MR. JACOBSON:

211 MR. JACOBSON: Now what particular assignments did you assign your various deputies on that day at the Courthouse?

SGT. REICHERT: Deputy Stroika was assigned to Mr. Grobschmidt's private office. Deputy Rowland and Deputy Marlowe were assigned to the doorway leading into room 214AA. Deputy Sobecke and Deputy Bialk were assigned to the doorway, No. 213 going into Mr. Grobschmidt's private office.

212 A. That is correct. The other deputies were on a standby basis.

223 MR. JACOBSON: You stated that deputies Rowland and Marlowe were assigned to the door outside of Room 214AA, is that correct?

SGT. REICHERT: Yes, sir.

Q. What instructions were they given as to what their duty was outside of that door?

A. The instructions I gave them were to allow only authorized personnel, press, radio and television people and supervisors to use that and people who had appointments with supervisors or sought an appointment. They were the only ones allowed to go into that areaway.

Q. That was in the public waiting room, 214AA?

A. That is in the Committee Clerk's Office, Room 214AA.

Q. Now as to Deputy Sobecke and I believe it is Bialk, stationed in front of Room 213, is that correct?

A. That is right.

Q. What did you instruct them as to their duty in front of the door that they were stationed at?

A. Their instructions were to allow no one to go in there unless okayed by Mr. Grobschmidt or myself and I would have to have the okay from Mr. Grobschmidt.

DEP. JARVIS ROWLAND sworn in:

CROSS EXAMINATION
BY MR. JACOBSON:

253 MR. JACOBSON: Were you given any further instructions by Sgt. Reichert as to what you were to do in front of Room 214AA when you were stationed there?

254 DEP. ROWLAND: Basically was to allow authorized people in this room. By that if I may clarify?

Q. Certainly clarify it.

A. That is any person that had business with the supervisors.

Q. Did he tell you what constituted business?

A. Not specifically that particular morning.

MR. JACOBSON: Then it was left up to you what constituted business for the supervisors, is that correct?

DEP. ROWLAND: Yes, yes and no. Actually the supervisors would tell us who they expected. Mr. Grobschmidt said his office was open for anybody that wished to talk to him.

Q. And as to authorized persons that were to be allowed entrance to Room 214AA, Sgt. Reichert elaborated on what constituted authorized persons?

A. Not directly, no.

Q. This again was left up to your discretion?

A. To a certain degree, yes.

EUGENE GROBSCHMIDT
CROSS EXAMINATION
BY MR. JACOBSON:

286 MR. JACOBSON: The normal procedure for seeing, if you know, the normal procedure for seeing a member of the County Board of Supervisors or yourself, would be for a citizen to open the door to Room 214AA, approach the desk where your secretary sits, and then request of your secretary whether they could have an appointment to see whatever supervisor or the individual the person is interested in seeing, is that correct?

287 MR. GROBSCHMIDT: That is the normal procedure, yes.

Q. Normally, sheriffs are not stationed outside of the room, 214AA to question citizens as to whether they have business or authorization, is that correct?

A. Normally, no.

JARVIS ROWLAND
DIRECT EXAMINATION
BY MR. MURPHY:

247 MR. MURPHY: Roughly, how many representatives of CORE remained in the corridor outside of Mr. Grobschmidt's office?

DEP. ROWLAND: Approximately 17.

Q. Were they orderly?

A. Yes, they were.

A. There was one that attempted to sit down, he was advised to stand because he was obstructing the hall. Another had his foot against the wall and in so doing, marking the wall.

248 Q. Did they comply with these requests?

A. They did.

SGT. HARRY REICHERT
DIRECT EXAMINATION
BY MR. MURPHY:

214 MR. MURPHY: Before and during the conference the corridor was clear and the delegates from CORE who remained in the corridor were generally cooperative, were they not?

SGT. REICHERT: That is right.

JOHN H. GIVENS
DIRECT EXAMINATION
BY MR. BARBEE:

366 MR. BARBEE: What did you ask Mr. Grobschmidt to do about his appointment of Mr. Lins?

367 MR. GIVENS: We asked that he remove him.

ARLENE K. JOHNSON sworn in:

DIRECT EXAMINATION
BY MR. BARBEE:

322 MR. BARBEE: Do you know what the Social Development Commission was designed to do?

323 MRS. JOHNSON: Well, as I understand it the Social Development Commission is set up to handle inner city problems. This is one of their functions. They will be and are dealing very closely with the minority races in Milwaukee County. As a member of this commission and having made biased remarks, CORE felt as though Fred E. Lins could not serve on this commission in the capacity it was designed.

EUGENE GROBSCHMIDT
DIRECT EXAMINATION
BY MR. MURPHY:

278 MR. MURPHY: You stated to them you would not ask Mr. Lins to resign?

MR. GROBSCHMIDT: In no undecided terms I said I would not ask Mr. Lins to resign.

DANIEL R. KENNEY
DIRECT EXAMINATION
BY MR. BARBEE:

347 MR. KENNEY: On the 29th I noticed on my arrival at the office, again a little after 9 o'clock, that there were two chairs in the same area.

MR. BARBEE: Then on Friday the same number?

A. As I recall the same number.

Q. Two?

A. Two chairs.

JOHN H. GIVENS
DIRECT EXAMINATION
BY MR. BARBEE:

367 MR. BARBEE: Were you successful at this conference?

MR. GIVENS: No, sir.

ARLENE K. JOHNSON
DIRECT EXAMINATION
BY MR. BARBEE:

322 MRS. JOHNSON: I was at the Courthouse protesting the inactions of an elected public official who CORE had a grievance with.

MR. BARBEE: What was the nature of the grievance?

A. Eugene Grobschmidt whose office is in the County Courthouse failed to act on the statements -- the prejudiced biased statements by an appointee of his to the Social Development Commission.

JOHN H. GIVENS
CROSS EXAMINATION
BY MR. MURPHY:

373 MR. MURPHY: You were displeased then with the results, correct?

MR. GIVENS: I think if anyone had been insulted as the Negroes have by Mr. Lins' comments, they too would be.

Q. Be that as it may, what I asked you was whether you were dissatisfied with the results?

A. Yes.

Q. Your intent then was to effect a different result by non-violent protest, correct?

A. Yes, sir.

CLARA E. WEAVER sworn in:

CROSS EXAMINATION
BY MR. MURPHY:

390 MRS. WEAVER: When a elected official makes a remark that was made by Mr. Lins and he is allowed to continue to this day on the type of commission that was to deal with minorities and he makes a slanderous remark concerning minorities, I feel that I have a right to protest this official. That was what I was doing.

JERRY W. BERNDT sworn in:

CROSS EXAMINATION
BY MR. MURPHY:

398 MR. MURPHY: You hoped that public pressure would cause him to change his mind about Mr. Lins' appointment, correct?

MR. BERNDT: I was hoping by our protesting that he may change his mind, yes.

MARCELLINE TAYLOR sworn in:

DIRECT EXAMINATION
BY MR. BARBEE:

402 MISS TAYLOR: Yes. After it was over I could tell by the look on their face they were not satisfied with what had happened in the room. We hadn't been successful. Mr. Lins hadn't been removed. So I decided to sit down in protest next to the wall.

JOHN H. GIVENS
DIRECT EXAMINATION
BY MR. BARBEE:

367 MR. GIVENS: Approaching the waiting room area and seeing no chairs vacant and the area congested with any number of people in the area, I began my sit in by sitting in the empty chair that belonged to the receptionist.

MR. BARBEE: How long did you remain in this chair which belonged to the receptionist?

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367 MR. GIVENS: Approaching the waiting room area and seeing no chairs vacant and the area congested with any number of people in the area, I began my sit in by sitting in the empty chair that belonged to the receptionist.

MR. BARBEE: How long did you remain in this chair which belonged to the receptionist?

A. Approximately three minutes.

368 Q. What did you do after Mrs. Weaver was dragged out of the office?

A. Well, not wanting to occupy this chair that the receptionist wanted to use, I moved to the floor besides Mrs. Johnson and continued my protest at that position.

MR. BARBEE: Will you describe to the Court and Jury your posture?

MR. GIVENS: I was sitting on the floor with the back to the partition and my knees drawn up very close to my chest with my arms around my knees.

Q. Did you have an insignia or sign on your person?

A. Yes, sir.

Q. Where did you have it?

A. It was pinned on my lapel.

Q. What did it say, if anything?

A. "Lins Must Go, Core."

Q. About how large was the sign?

A. Approximately four by five inches.

Q. Was your conduct, your language abusive in any manner when you were there?

A. No, sir.

Q. At 214AA or during the demonstration?

A. No, sir.

369 Q. Profane?

A. No, sir.

Q. Boisterous?

A. No, sir.

Q. Unreasonably loud?

A. No, sir.

Q. Violent?

A. No, sir, I said nothing.

CLARA E. WEAVER
DIRECT EXAMINATION
BY MR. BARBEE:

385 MR. BARBEE: Did you explain -- explain to the Judge and Jury the manner in which you entered Room 214AA?

MRS. WEAVER: I entered the room behind Mrs. Johnson. The door was open partway and I went in. It was quite crowded. It wasn't easy but I just went in as the door was opened.

Q. Did you walk in?

A. Yes, I did.

Q. Did you walk in very rapidly?

A. No, it was impossible at that time to walk in rapidly.

Q. Why was it impossible?

A. There were many people in the room.

386 Q. What did you do once you entered the room?

MRS. WEAVER: I entered, I looked around to see if there were any chairs. If there were any chairs, I didn't see them. I walked over to where this partition was. I sit down with my back to the partition.

Q. What did you do after you sat down with your back to the partition?

A. I didn't do anything. As I sit down I pulled my legs up close to my body and I sat there.

DANIEL R. KENNEY
DIRECT EXAMINATION
BY MR. BARBEE:

351 MR. KENNEY: Well, Mrs. Weaver as I recall sat down with her back to a partition in the office which is half metal and half glass. The lower half is metal. She sat down with her back to this partition. Simply sat down as I recall and crossed her legs on the floor. Within seconds, two members of the Sheriff's Department who had been in the

area that morning, ordered her to get up. She did not respond. She didn't get up. As I recall they picked her up by the arms and removed her from the room. That is out the narrow passageway to the door leading to the corridor.

CLARA E. WEAVER
DIRECT EXAMINATION
BY MR. BARBEE:

387 MR. BARBEE: Now I will show you to the right of this exhibit, that is the side of you that is shown by the sign, "Freedom Now, CORE" ...

DEP. ALVIN STROIKA
CROSS EXAMINATION
BY MR. JACOBSON:

201 MR. JACOBSON: She had her legs drawn up close to her body, is that correct?

DEP. STROIKA: Generally, yes, they were pulled up.

ARLENE K. JOHNSON
DIRECT EXAMINATION
BY MR. BARBEE:

320 MRS. JOHNSON: Well, as I entered the waiting room, as I said it was very, very crowded, there was people all over standing shoulder to shoulder, I entered into the waiting room. I looked around to see if there were chairs. I saw Mr. Givens sitting in a chair behind a desk. At this point seeing no other chairs either that they were blocked from my vision by the people standing in

the room, I walked over to a glass partition and sat down with my legs to the side and my back to the partition.

322 MR. BARBEE: Did you have any Core sign pinned on you at the time that you entered the corridor and the waiting room to 214AA?

MRS. JOHNSON: Yes, I did.

Q. What did the sign say?

A. "Freedom Now, Core".

JARVIS ROWLAND
DIRECT EXAMINATION
BY MR. MURPHY:

249 MR. MURPHY: What did you do then?

DEP. ROWLAND: I immediately slid into the doorway preventing any further people from entering that room.

JERRY BERNDT
DIRECT EXAMINATION
BY MR. BARBEE:

393 MR. BERNDT: Upon the exist of three of the members from the negotiating team, I knew that the meetings were a failure. I tried to gain entry to the office, but I was unable to. I sat down on the floor just to the right of the door, 214AA.

394 MR. BARBEE: In what manner did you sit down to the right of the door to Room 214AA?

A. Indian fashion. I had my legs crossed underneath me.

MARCELLINE TAYLOR
DIRECT EXAMINATION
BY MR. BARBEE:

403 MR. BARBEE: Where did you sit?

MISS TAYLOR: I sat next to Jerry. I was on his right.

ROBERT BIALK sworn in:

CROSS EXAMINATION
BY MR. JACOBSON:

271 DEP. BIALK: I observed the remaining party leave to the south and I observed the other demonstrators sit and I saw people being carried out.

ARLENE K. JOHNSON
CROSS EXAMINATION
BY MR. MURPHY:

336 MR. MURPHY: Would you describe what you did as a sit in?

MRS. JOHNSON: A sit in according to the Congress of Racial Equality is thusly. It is when you are in the form of a protest, it is a form of demonstration at all times according to the CORE rules for action, if there are chairs available, these chairs will be taken. Where there are no chairs,
337 where there is an overflow, the members then will sit on the floor with their knees drawn up to their chest, their backs protected by any nearby partition

such as a wall, chair, table legs, thusly. This is to protect their back from personal injury in the event of police abuse.

DEFENDANTS' MOTION

313 Defense Counsel motion to dismiss at close of plaintiff's case on basis that the State had not proved a prima facie case against defendants.

(AFTER THE JURY'S VERDICT OF GUILTY)

412 COURT: The Court imposes the same fine that was imposed by the lower Court, $100 and costs. Therefore, no additional fine will be imposed by the Court. The exact same fine shall remain in full force and effect.

413 MR. JACOBSON: We would ask judgment be entered notwithstanding the verdict inasmuch as it is the position of the defense that the Jury Verdict is contrary to the great weight of the evidence that was introduced through the witnesses on the trial. No evidence or showing of disorderly conduct as was required by 947.01, the section of the Statute with which the defendants are being charged.

COURT: Mr. District Attorney.

MR. MURPHY: I oppose such motion.

COURT: The said motion is denied by the Court. The Court feels there was ample evidence for the Jury to make the finding it did and the Court will not disrupt the said Jury finding in this case.

MR. JACOBSON: I would move for a new trial on the grounds that in the interests of justice the verdict was against the great weight of evidence as introduced on this trial.

COURT: Mr. District Attorney?

MR. MURPHY: I oppose that motion as well, Your Honor.

COURT: Said motion is denied by the Court.

424 NOTICE OF APPEAL
(Formal Parts Omitted)

TO: THE HONORABLE JOHN L. COFFEY
Circuit Court Judge In and For
Milwaukee County, Wisconsin

HUGH R. O'CONNELL, ESQ.
District Attorney
Milwaukee County, Wisconsin

Clerk of Circuit Court
Criminal Division
Milwaukee County, Wisconsin

PLEASE TAKE NOTICE that the Defendants, JOHN H. GIVENS, CLARA E. WEAVER, MARCELLINE TAYLOR, ARLENE K. JOHNSON, and JERRY W. BERNDT, do hereby appeal to the Supreme Court of the State of Wisconsin from the judgment entered herein on the 27th day of May, 1964 by the Circuit Court, Criminal Division,

Branch 12, the Honorable John L. Coffey presiding, and from the whole and every part thereof.

Dated this 11th day of January, 1965.

THOMAS M. JACOBSON
Attorney for Defendants

BARBEE & JACOBSON
110 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

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Milwaukee
Wisconsin

LLOYD A. BARBEE AND THOMAS M. JACOBSON K/P
Attorneys at Law
2606 WEST FOND DU LAC AVENUE
MILWAUKEE, WISCONSIN 53206

July 18, 1964

AREA CODE 414
CONCORD 4-9400

Mr. Carl Rachlin
General Counsel
Congress of Racial Equality
38 Park Row
New York, New York

JUL 20 1964

Dear Mr. Rachlin:

We hope you received our correspondence of July 7th relating to the Milwaukee CORE sit-in cases. We expect the transcript will be ready very soon. There remains the problem of raising approximately $400.00 to pay the appeal costs. Suggestions in this area would be appreciated.

There are several attorneys in Milwaukee willing to go to Mississippi and provide legal services the week of July 27th. We are willing to give a week of our time if lawyers are needed. The only renumeration would be transportation costs if that expense could be provided. Please let me know if lawyers are needed in Mississippi the week of July 27th and what arrangements for going to Mississppi, etc. will be made if lawyers are in demand.

The lawyers will go to other areas in the South if Mississippi is will covered. Another possibility for services would be the week of August 17th if July 27th is covered.

Looking forward to hearing from you.

Warm Personal Regards,

Thomas M. Jacobson

Thomas M. Jacobson

TMJ/ed

9/ ✓ 8

Schwartz child

Carl—
answer

July 23, 1964

Thomas M. Jacobson, Esq.
2606 Fond Du Lac Avenue
Milwaukee, Wisconsin 53206

Dear Mr. Jacobson:

Since Mr. Rachlin is out of town currently, and I know he would want you to have the information you requested about Mississippi, I am making bold to answer in his stead.

We have checked with the Lawyers Constitutional Defense Committee. They inform us that as of the present time, they have no further need for attorneys to go to Mississippi. If it should become necessary as the summer progresses to obtain more attorneys, Mr. Henry Schwartzchild of the Lawyers Constitutional Defense Committee will get in touch with you.

Next week when he returns, I know Mr. Rachlin will want to write you with suggestions for raising the money you mentioned.

Very truly yours,

Ruth R. Larocca
Secretary to Carl Rachlin

RRL/bmw

Milwaukee

August 12, 1964

Thomas M. Jacobson, Esq.
Barbee and Jacobson
2606 West Fond du Lac Avenue
Milwaukee, Wisconsin 53206

Dear Tom:

Is there any possibility of your appealing you case *in forma pauperis*, in view of the fact that the people involved do not have the $400.00.

If not, will the Bar Association help raise the money for this purpose? If this doesn't work, please let me know and we will see what we can do at this end.

Kindest regards,

Carl Rachlin
General Counsel

CR:rrl

KARPATKIN, OHRENSTEIN & KARPATKIN
COUNSELORS AT LAW

MARVIN MOSES KARPATKIN
MANFRED OHRENSTEIN
RHODA HENDRICK KARPATKIN

660 MADISON AVENUE
NEW YORK 21, N. Y.
TEMPLETON 2-9600
CABLE "KARPOLAW NEWYORK"

AUG 17 1964

August 13, 1964

Thomas Jacobson, Esq.
2606 Fond du Lac Avenue
Milwaukee, Wisconsin

Re: State v. Givens, et al

Dear Mr. Jacobson:

I have reviewed the entire file which you sent to the CORE offices in New York, and I am writing to you pursuant to Carl Rachlin's request.

Should you desire any assistance in the researching and/or writing of the Givens brief, we will be able to provide the services of one of our volunteer lawyers.

Furthermore, it is highly likely that the personal services of a law student named Kris Mullick will be made available to you. She is a member of the Law Students Civil Rights Research Council, which provides manpower for many such projects. Kris will contact you when she arrives in Milwaukee early next week.

If we are to be of any assistance, it is essential that we have a copy of the trial transcript in the Circuit Court. Please forward a copy as soon as possible, and also advise us of the relevant time limits for perfecting this appeal.

Yours sincerely,

Marvin Moses Karpatkin per EB

Marvin Moses Karpatkin

MMK:eb
cc: Carl Rachlin, Esq.

LLOYD A. BARBEE AND THOMAS M. JACOBSON
Attorneys at Law
2606 WEST FOND DU LAC AVENUE
MILWAUKEE, WISCONSIN 53206

AUG 20 1964 Wisc

AREA CODE 414
CONCORD 4-9400

August 19, 1964

Marvin Moses Karpatkin, Esq.
660 Madison Avenue
New York 21, N.Y.

Re: State vs. Givens, et. al.

Dear Mr. Karpatkin:

We are in receipt of your letter dated August 13, 1964.

Your assistance on the brief in the Givens case will be greatly appreciated, and we certainly intend to avail ourselves of your kind offer.

The trial transcript has not to date been completed. The time for perfecting appeal from the Circuit Court to the Supreme Court in a criminal misdemeanor case is one year from date of judgment.

You may have gathered from correspondence to Mr. Rachlin that one of our problems will be to raise sufficient funds to pay the remaining appeal costs. The local Milwaukee CORE chapter is having serious internal problems making aid from the CORE chapter virtually impossible in the forseeable future.

Mr. Rachlin suggested appealing in forma pauperis. My reading of the Gideon case which extends right of individuals to have Court appointed counsel, does not extend to criminal misdemeanor cases. For this reason we are certain the Court will not appoint us counsel for the appeal thereby assuring the State will pay necessary costs.

We look forward to working with you on the CORE sit-in cases, and again appreciate your assistance. We shall notify you immediately of future developments in said cases.

Sincerely yours,

Thomas M. Jacobson

Thomas M. Jacobson

TMJ: jw

cc: Carl Rachlin, Esq.

LLOYD A. BARBEE AND THOMAS M. JACOBSON
Attorneys at Law
2606 WEST FOND DU LAC AVENUE
MILWAUKEE, WISCONSIN 53206

AREA CODE 414
CONCORD 4-9400

does Karpatkin have this file?

September 12, 1964

SEP 14 1964

Marvin Moses Karpatkin, Esq.
660 Madison Avenue
New York 21, N.Y.

Re: State vs. Givens, et. al.

Dear Mr. Karpatkin:

Under separate cover we are forwarding to you the transcript of the trial in the above entitled Matter.

We shall discuss with the Clerk of the Supreme Court appealing in forma pauperis.

When you called last week we were campaigning on behalf of my partner who was candidate for the State Assembly. Wisconsin's Primary Election was last Tuesday. Mr. Barbee was opposed for the nomination by four other aspiring candidates. Fortunately my partner was nominated, his vote total larger than his four opponents combined.

We hope to have a draft of the brief completed in a few months. At that time we shall confer with some of my former law professors who indicated a willingness to assist on the brief in the sit-in cases. Perhaps you know Willard Hurst, Samuel Mermin, or Abner Brodie.

We enjoyed hearing from you last week and look forward to seeing you again in New York during the CORE lawyer's conference.

We shall keep you informed of any developments relating to the appeal.

Thank you again for your assistance.

Sincerely yours,

Thomas M. Jacobson

Thomas M. Jacobson

TMJ/ed
cc: Carl Rachlin, Esq.

file Wisc. here where?

Milwaukee
Mr Karpatkin
put today's
the file

September 24, 1964

Thomas M. Jacobson, Esq.
2606 West Fond du Lac Avenue
Milwaukee, Wisconsin 53206

Dear Tom:

Thank you for the copy of your letter of September 12th to Marv Karpatkin.

Please keep in mind that we are ready, willing and able to help you at any level you desire. In fact, if you prefer, we will prepare the first draft of your brief, which you can edit and put in final form.

Regards,

Carl Rachlin
General Counsel

cc: Marvin Karpatkin, Esq.

CR:hdl

LLOYD A. BARBEE AND THOMAS M. JACOBSON
Attorneys at Law
2606 WEST FOND DU LAC AVENUE
MILWAUKEE, WISCONSIN 53206

September 28, 1964

AREA CODE 414
CONCORD 4-9400

SEP 30 1964

Marvin Moses Karpatkin, Esq.
660 Madison Avenue
New York 21, N.Y.

Re: State v. Givens, et. al.

Dear Mr. Karpatkin:

We were in Madison Friday to discuss with Franklin Clarke, Clerk to the Wisconsin Supreme Court, the pending appeal in our sit-in cases. Specifically, we discussed the time limit for noticing appeal.

After our discussion we found out that the Clerk was very confused regarding notice procedure in an appeal from a circuit court criminal misdemeanor action. His feeling was Wisconsin Statutes 274.01 as amended in 1962 required notice to be filed 3 months from date of notice of judgement, and if no notice given then 6 months from date of entry of judgement. However my reading of 274.01 limits same to civil actions or special proceedings...

I discussed my interpretation with Professor John Conway at University of Wisconsin law school later Friday and after considerable discussion we came to an accord on the notice time limit. Section 958.13 Wisconsin Statutes applies not only to felony appeals, but misdemeanor appeals as well. The section in question was formerly entitled appeal, time when taken. The section was recently entitled to read felony appeals. However the section title does not control over the section text, thus the decision we have one year, as I originally wrote you.

As to proceeding <u>in forma pauperis</u>, Mr. Clarke stated there is no such procedure in Wisconsin. What has been done is a letter requesting permission to submit a type written brief because of limited funds. However this procedure has seldom been followed, and even more rarely permitted by the Supreme Court. The type written brief must conform to printed brief size, and follow the rules as to number of words per page and number of copies to be submitted. See Wisconsin Statutes 251.39 and 251.43.

Mr. Clarke stated in reply to question relating to Supreme Court appointing me counsel to appeal case in order to have costs paid by State, that appointment of counsel in misdemeanor cases is not followed by Supreme Court. He referred me to <u>Gideon</u> case.

In one of our Supreme Court cases relating to discrimination by trailer parks and whether a trailer park is a public accomodation within Wisconsin's Denial of Right Law, the Milwaukee Jewish Counsel filed an amicus brief. The Milwaukee Jewish Counsel through the B'nai B'rith filed a brief printed by a printer they employ in St. Louis I believe. Is it possible you or Mr. Rachlin have access to a printer that could cover the printing of our briefs and the cost involved? We have succeeded in raising through personal contact $60.00 of the remaining $86.70 due on our transcript.

We received Mr. Rachlin's letter dated September 24, 1964, wherein he offers to prepare the first draft of our brief. I have begun working on my first draft of the brief and hope to complete same in a month. I would appreciate you preparing a draft with your thoughts to compare with my own. After I have a suitable draft the Professors I indicated to Mr. Rachlin in an earlier letter will look same over and offer their suggestions.

Because of the confusion relating to notice of appeal time limit I am preparing the notice of appeal and the required appeal bond to file shortly. I will hold the filing for about two weeks. Please indicate whether you prefer my waiting for a longer period to file my notice. We are ready to begin working now on preparing the case.

Hope to hear from you soon.

Warm Personal Regards,

Thomas M. Jacobson

Thomas M. Jacobson

TMJ/ed
cc: Carl Rachlin, Esq.

copy to Carpenter

Dear Tom

Since you are working on a draft there is no point to both we getting. Please let us see a copy of your draft as soon as possible!

Regards

~~10/15~~
11/1 Hannie write

October 6, 1964

Thomas M. Jacobson, Esq.
2606 West Fond du Lac Avenue
Milwaukee, Wisconsin 53206

Dear Tom:

Re: State v. Givens, et. al.

With reference to your letter of September 28th, since you are working on a draft, there is no point to both of us overlapping.

Please let us see a copy of your draft as quickly as possible.

Kindest regards,

Carl Rachlin
General Counsel

cc: Marvin Karpatkin, Esq.

CR:hdl

Hon's

LLOYD A. BARBEE AND THOMAS M. JACOBSON
Attorneys at Law
2005 WEST FOND DU LAC AVENUE
MILWAUKEE, WISCONSIN 53205

October 26, 1964

[illegible]
[illegible] Equality
National Action Committee
[illegible] Way
New York 32, New York

Dear Miss [illegible]:

This letter is being written to you because our local [illegible] and the grape vine are projecting the death of CORE in Milwaukee. As a person involved in civil rights action for the past 25 years, I am alarmed that a one-race press has seized on information about the organization's internal difficulties. It is disturbing to pick up the Milwaukee JOURNAL or the Milwaukee SENTINEL and read that the local chapter of CORE is embroiled in a power struggle, and further to read specific identification of the alleged leaders and supporters of the factions. It was gratifying, however, that the local Negro press ignored this [illegible]. Unfortunately, however, that the local Negro press ignored this [illegible] knowledge until an excellent editor was replaced by a [illegible] who does not understand the scope of the civil rights [illegible].

[illegible] it appears that the organization is attempting [illegible] back into the main stream of Milwaukee's [illegible]. It was disgusting to discover that [illegible] was given a copy of a letter sent to you [illegible] that Milwaukee no longer needs CORE and [illegible] leader up to sensaught and ridicule.

[illegible] has embarrassed this has brought to a [illegible] civil rights workers in this city. I hope that [illegible] Milwaukee the local chapter. We need [illegible] direct action organization in Milwaukee [illegible] significant inroads in our struggle for [illegible] equality. Milwaukee is a conservative [illegible] progressive. What we need to change it over [illegible] organizations fired with a tenacious, but [illegible] publicity must manifest itself in [illegible] which goes to the root of the problem [illegible] and cause until these problems are solved.

Finally, it seems to me that the national organi[illegible] would benefit from allowing Milwaukee CORE to develop the potentiality which many of us see in it. Needless to say, the community would certainly benefit from such developments.

Yours for Freedom NOW,

Lloyd A. Barbee

LAB/km

cc: Mr. James Farmer, National Director

11/16

November 4, 1964

Thomas M. Jacobson, Esq.
2606 West Fond du Lac Avenue
Milwaukee, Wisconsin 53206

Re: State v. Givens, et al.

Dear Tom,

How are things going with the draft? I look forward to receiving a copy soon.

Kindest regards,

Carl Rachlin
General Counsel

cc: Marvin Karpatkin, Esq.

CR:hdl

KARPATKIN, OHRENSTEIN & KARPATKIN
COUNSELORS AT LAW

MARVIN MOSES KARPATKIN
MANFRED OHRENSTEIN
RHODA HENDRICK KARPATKIN

660 MADISON AVENUE
NEW YORK 21, N.Y.
TEMPLETON 2-9600
CABLE "KARPOLAW NEWYORK"

November 10, 1964

Thomas M. Jacobson, Esq.
2606 West Fond du Lac Avenue
Milwaukee 6, Wisconsin

Re: State v. Givens, et al

Dear Mr. Jacobson:

I expect to be in Chicago at the Sheraton-Chicago Hotel from Thursday, November 12 through Sunday, November 15, 1964. I also expect to have some free time on Saturday.

Carl Rachlin has suggested that I let you know, and suggest to you the possibility of our using this occasion to confer concerning this case.

I doubt if there will be enough flexibility in my schedule to permit me to come over to Milwaukee. Therefore, if it would not be too much of a hardship for you to come to Chicago, perhaps we could work for a few hours on Saturday morning or afternoon.

I will telephone you when I am in Chicago to see if we can make the arrangements.

Yours sincerely,

Marv.

Marvin M. Karpatkin

MMK:eb

cc: Carl Rachlin, Esq.

Note by CR: They met. MK satisfied Jacobson handling it properly

Underwriter file
check w/ Tom
30

KARPATKIN, OHRENSTEIN & KARPATKIN
COUNSELORS AT LAW

MARVIN MOSES KARPATKIN
MANFRED OHRENSTEIN
RHODA HENDRICK KARPATKIN

660 MADISON AVENUE
NEW YORK 21, N. Y.
TEMPLETON 2-9600
CABLE "KARPOLAW NEWYORK"

January 19, 1965

Thomas M. Jacobson, Esq.
110 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Re: State v. Givens

Dear Tom:

The record is enclosed, and I await your draft of the brief.

When you are here for the conference, I'm sure we'll have a chance for a good discussion concerning the case.

Yours sincerely,

Marvin

Marvin M. Karpatkin

MMK:eb
Enc.

cc: Carl Rachlin, Esq.

AIRMAIL
SPECIAL DELIVERY

COPY

LLOYD A. BARBEE AND THOMAS M. JACOBSON
Attorneys at Law
110 EAST WISCONSIN AVENUE — SUITES 1010-11
MILWAUKEE, WISCONSIN 53202

February 10, 1965

AREA CODE 414
273-6670

Marvin Karpatkin, Esq.
660 Madison Avenue
New York, New York 10021

Re: State vs. Givens

Dear Marvin:

Enclosed you will find the long awaited first draft of my brief in the above case.

I have several questions relating to some of the arguments I have made, but rather than raise them in this letter, I would prefer your reading the brief and then enclosing your critical comments first.

Time is of the essence in that now I would just as soon submit the brief as of the date it is due, March 1, 1965. However, I can get an extension if need be.

Thank you for your consideration.

Very truly yours,

Thomas M. Jacobson

TMJ/wf
Encl:
cc: Carl Rachlin, Esq.

LLOYD A. BARBEE AND THOMAS M. JACOBSON
Attorneys at Law
2606 WEST FOND DU LAC AVENUE
MILWAUKEE, WISCONSIN 53206

MAR 22 1965

AREA CODE 414
264-9400

March 19, 1965

1/2

Mr. Carl Rachlin
General Counsel
CORE
38 Park Row
New York 38, N.Y.

Re: CORE sit-in cases

Dear Mr. Rachlin:

Under separate cover is your copy of the Milwaukee CORE brief. Please submit your suggestions for improvements, etc. Thirty days for the State to reply, then we have ten days to reply to their brief.

Oral argument is now scheduled for April 30th.

Sincerely,

Tom Jacobson

Thomas M. Jacobson

TMJ/ee

brief in file -
hold for reply

4/~~7~~ 20

March 22, 1965

Thomas M. Macobson, Esq.
110 East Wisconsin Ave.
Milwaukee, Wisconsin 53202

Dear Tom,

We this day have received the brief for the Supreme Court of Wisconsin in the cases entitled Wisconsin v. Givens, et al.

I will try to read the brief in the next day or so. In any event, as soon as you receive the reply, let us have it and we will help prepare any additional brief.

With kindest regards,

Sincerely,

Carl Rachlin
General Counsel

CC: Marvin Karpatkin, Esq.

CR:hdl

brief in file
hold for reply brief

August 31, 1965

Mr. Allan Koritzinsky
1620 Ahrens Street
Manitowoc, Wisconsin

Dear Allan:

Thank you for sending me a copy of the decision in the Givens v. Wisconsin case, which I return to you.

I look forward to seeing you again in the near future.

Sincerely,

CARL RACHLIN
General Counsel

CR/cs
Enc.

August 31, 1965

Thomas Jacobson, Esq.
Barbee & Jacobson, Esqs.
110 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Re: Givens, et. al. v. Wisconsin

Dear Tom:

I just received a copy of your decision in the above case. What are your plans? Can you make a motion to reargue based, perhaps on the dissent, so as to get us more time if we want to go to the United States Supreme Court. Apparently your ninety days to the United States Supreme Court will presently expire on September 23 or 24th.

Let me hear from you promptly. Check with the Wisconsin Supreme Court as to your right to make a motion to reargue on the original papers.

Sincerely,

CARL RACHLIN
General Counsel

CR/cs

cc: Marvin Karpatkin, Esq.

LLOYD A. BARBEE AND THOMAS M. JACOBSON
Attorneys at Law
110 EAST WISCONSIN AVENUE — SUITES 1010-11
MILWAUKEE, WISCONSIN 53202

SEP 7 1965

September 5, 1965

AREA CODE 414
273-6670

Carl Rachlin, Esq.
General Counsel, CORE
38 Park Row
New York, New York

Dear Carl:

We are in receipt of your letter dated August 31st.

After much discussion with local attorneys assisting in the Givens et al. v. State of Wisconsin cases the consensus was to drop further proceedings in the courts. The Wisconsin Supreme Court does allow motions for re-hearing but the practice is not to grant re-hearings.

The decision was gratifying in that one Judge had the courage to dissent and that the true liberality of other Judges was exposed publicly. The disappointment aside from the decision going against us was the reasoning of Judge Gordon. Our request for an instruction on ejusdem generis was denied by the trial court yet Judge Gordon indicated this rule of construction saved the statute from vagueness. The discussion about disobeying a lawful order is typical of northern clouding the issue thinking. If the conduct was lawful the order was not. The charge was disorderly conduct and not disobeying an officer. I was surprised that Judge Wilkie went with the majority. Judge Gordon I have never felt was a true liberal.

If you desire further information regarding the cases let me know.

Very truly yours,

Thomas M. Jacobson

TMJ/aj

Gives to Max.

September 9, 1965

Thomas M. Jacobson, Esq.
Barbee & Jacobson
110 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Dear Tom:

I have a little difficulty in understanding why you feel your case should not be appealed. From our knowledge of the facts the case seems pretty good.

The dissent seems to bear this out. Also the points you make similarly indicate a reason for appealing, but time is running out.

Let me hear from you.

Sincerely,

CARL RACHLIN
General Counsel

CR/cs

cc: Marvin Karpatkin, Esq.

September 30, 1965

Thomas Jacobson, Esq.
Barbee & Jacobson
110 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Dear Tom:

Re: Wisconsin v. Givens

I haven't heard from you. I am anxious to appeal your case to the U. S. Supreme Court. We will do all the work here. Please take steps to preserve the time by a motion to reargue or whatever your Wisconsin procedure is.

I expect to be in Chicago on October 21, and 22nd. Perhaps I can see you.

Sincerely,

CARL RACHLIN
General Counsel

CR/cs

Milwaukee

LLOYD A. BARBEE AND THOMAS M. JACOBSON
Attorneys at Law
110 EAST WISCONSIN AVENUE — SUITE 1010
MILWAUKEE, WISCONSIN 53202
AREA CODE 414
273-6670

October 12, 1965

OCT 13 1965

Carl Rachlin, Esq.
General Counsel, CORE
38 Park Row
New York, New York

Re: State vs. Givens et al.

Dear Carl:

I have been out of the City and just recently returned. Thus the delay in answering your letters dated September 9 and September 30.

I have reviewed the decision in the Givens case carefully and decided not to proceed further. To preserve certioriari my research indicated a motion for re-hearing in the Wisconsin Supreme Court was not necessary. However the ninety days for requesting certioriari to the U.S. Supreme Court have lapsed in the Givens decision. Thus both on the merits and as to the time for appeal this case I believe this case has run its course.

I will not be available October 21 or October 22 to see you in Chicago.

If our office can be of further service to you in the future feel free to call on us at anytime.

Sincerely,

Tom Jacobson

Tom Jacobson

TMJ/aj

Please Retain Original Order

File
N v World's Fair Cases

February , 1964

Dear Defendant:

In order to expedite the appeals from convictions resulting from last summer's civil rights demonstrations in New York County, I have been requested by Carl Rachlin, Esq., General Counsel to CORE, and the attorneys who appeared for you and other defendants at trial, to prepare a stipulation with the District Attorney. A copy of the stipulation is enclosed.

This stipulation affects your rights in the following way:

The case of People vs. Penn was a Rutgers sit-down case tried by Howard Squadron, Esq., as attorney for defendants. The case, in the opinion of the undersigned and other counsel, raises all of the basic legal issues involved in the demonstration cases. The appeal in this case has already been briefed and argued in the Appellate Term. If this case should be affirmed in the Appellate Term, an appeal will be taken to the Court of Appeals. No decision has yet been made, whether a petition for certiorari will be filed, if that should be necessary.

Counsel believe that the Penn case is a good selection as the basic test case on these issues.

The stipulation, in effect, binds you to be the outcome in the Penn case, except that if your sentence exceeded five days and if the Penn case is affirmed, your right to appeal on the ground of excessiveness of sentence is preserved. If the Penn case should be remanded for a new trial, the effects of the stipulation terminate since it cannot now be anticipated what the people or the defendants in the Penn case, or we, will desire to do in that event.

By agreeing to the stipulation you are therefore waiving the right to have your appeal separately presented, except in certain events. On the other hand, should the Penn appeal be successful, you will have the benefit of that success

without the necessity of independent proceedings.

I, and the other counsel mentioned above, request that you consent to the stipulation. We request it as being in your best interest. It will save considerable time, duplication of effort and money.

Further, the trial record in the Penn case is one of the best of all those compiled in these cases and is, from a technical standpoint, superior.

I would, therefore, appreciate your signing and returning to me as quickly as possible the enclosed consent form. If you have any question, please call me.

Sincerely yours,

George Schiffer

Encl.

STIPULATION

WHEREAS the case of People vs. Penn et al. has been briefed and argued on February 5, 1964, in the Appellate term of the Supreme Court, and

WHEREAS basic principles of law were therein raised, and

WHEREAS there are presently pending several other appeals to the said Court from convictions had on various dates in the Criminal Court of the City of New York, which are listed in schedules "A" and "B" annexed hereto and made a part hereof; and

WHEREAS the cases listed in these schedules, although they involve independent incidents and occurrences, are nevertheless governed by points of law presented to this Court in People vs. Penn; and

WHEREAS the parties hereto subscribed are desirous of an expeditious determination of the issues in all cases;

IT IS HEREBY STIPULATED AND AGREED by and between FRANK HOGAN, District Attorney of New York County and GEORGE SCHIFFER as attorney for the defendants listed in schedule "A" that:

1. (a) If the case of People vs. Penn is affirmed by the Court of Appeals and by the United States Supreme Court, then the defendants listed in schedule "A" shall withdraw their appeals.

(b) Within ten days after the order of the Court of Appeals affirming People vs. Penn is entered (if such an order is made) attorney for defendants shall

advise the District Attorney whether or not it is intended to petition for certiorari in People vs. Penn. If a petition is not to be filed in People vs. Penn, then the appeals of the defendants listed in sehedule "A" shall be withdrawn five days after the date of the notice to the District Attorney. If a petition is filed, but denied, or if the petition is granted but People vs. Penn is affirmed, then the appeals of the defendants listed in schedule "A" shall be withdrawn within five days after the entry of the Supreme Court's order. In any of such events, the defendants listed in schedule "A" shall surrender to serve their sentences (if any) or shall pay the fines imposed upon them (if any), no later than five days after the withdrawal of their respective appeals.

2. If People vs. Penn is reversed by the Court of Appeals or by the Supreme Court with mandate to dismiss or by this Court in such circumstances that the People have no right to appeal or the People determine that they will not appeal, then the appeals of the defendants listed in schedule "A" shall be consolidated and the People and defendants shall state to the Court that the case of People vs. Penn governs the consolidated appeals and that the convictions should be reversed and the complaints dismissed. Such action shall be taken within fortyfive days after the entry of the respective order.

3. If People vs. Penn is reversed and remanded, then all proceedings in the cases listed in schedule "A" shall be deemed adjourned until the 31st day after the entry of the remanding order.

IT IS FURTHER STIPULATED AND AGREED by FRANK HOGAN, District Attorney of New York County and GEORGE SCHIFFER as attorney for the defendants listed in schedule "B" that the foregoing stipulations shall apply to the defendants listed in

schedule "B" subject to the following additional stipulations:

4. In the events contemplated in paragraph 1(a), defendants listed in schedule "B" shall either comply with the provisions of paragraph 1(b) or shall, within fifteen days after the entry of the order or affirmance of the Court of Appeals or the United States Supreme Court, or the order denying the petition for certiorari (whichever shall last occur),notify the District Attorney of defendants' intent to prosecute their appeals on the issue of excessiveness of sentence only. Such appeals shall be perfected within thirty days after the date of such notice. Such appeals shall be predicated on the entire records and on the additional information before the sentencing court.

IT IS FURTHER STIPULATED AND AGREED that pending the occurrence of the events herein contemplated, the appeals of the defendants listed in schedule "A" and the defendants listed in schedule "B" shall be held in abeyance, subject to restoration on notice by the District Attorney consistent with this stipulation.

Dated : New York, New York
March , 1964.

FRANK HOGAN
District Attorney
County of New York

GEORGE SCHIFFER
Attorney for Defendants

CIVIL DISOBEDIENCE CASES

SCHEDULE "A"	NOTICE OF APPEAL FILED	5 DAYS OR LESS
Stephen Kosloff	Aug. 7, 1963	5 days
Max Hardman	Aug, 7, 1963	5 days
Jose Morales	Aug. 7, 1963	5 days
Dante Fiorello	Aug. 7, 1963	5 days
Athamasion Levidietis	Sep. 10, 1963	$25 or 5 days
Barbara Weill	Sept. 10, 1963	$25 or 5 days
Martha Dillard	Sept. 10, 1963	$25 or 5 days'
Gerald Lesser	Sept. 10, 1963	$25 or 5 days
Paul A. Bebral	Sept. 10, 1963	$25 or 5 days
Robert Brown	Aug. 2, 1963	5 days+30days SS
Joseph Jackson, Jr.	Aug. 2, 1963	5 days+30days SS
Janet Schwartz	Sept. 10, 1963	30 days SS
Nicassio Martinez	Sept. 10, 1963	30 days SS
Robert Hurwitt	Sept. 10, 1963	30 days SS
Sheila Brown	Aug. 2, 1963	5 days+30days SS

SCHEDULE "B"	NOTICE OF APPEAL FILED	6 days of more
Michael Schwerner	July 25, 1963	60 days
Lisa Henry	July 25, 1963	60 days
Samuel Friedman	July 25, 1963	60 days
Rita Schwerner	July 25, 1963	30 days
Harold Kersten	July 25, 1963	30 days
Robert Gore	July 26, 1963	60 days
Walter Flesch	July 26, 1963	60 days

SCHEDULE "A"	NOTICE OF APPEAL FILED	5 DAYS OR LESS
Sara Penn	Oct. 11, 1963	$25 or 5 days
Helena Levine	Oct. 11, 1963	$25 or 5 days
Barbara Plislcow	Oct. 11, 1963	$25 or 5 days
Edward Pitt	Oct. 11, 1963	$25 or 5 days
Benita Cannon	Oct. 11, 1963	$25 or 5 days
Claudio Ramos	Oct. 11, 1963	$25 or 5 days
Thomas McKenna	Oct. 11, 1963	$25 or 5 days
Meryl Chatkin	Oct. 11, 1963	$25 or 5 days
Isadore Bloom	Oct. 11, 1963	$25 or 5 days
David Rivera	Oct. 11, 1963	$25 or 5 days
Saul Gottlieb	Oct. 11, 1963	$25 or 5 days
Jeffrey Glick	Sept, 12, 1963	30 days SS
Steven Frieder	Sept. 12, 1963	30 days SS
Alexander Boyer	Sept. 9,1963	5 days
Antonio Vasquez	Sept. 9, 1963	5 days
Charles Saunders	Jan. 20, 1964	$25 + SS
Ernest Russell	Jan. 20, 1964	$25 + SS
Willie Holton	Jan. 20, 1964	$25 + SS

SCHEDULE "B"		6 Days or More
Vicki Morris	Sept. 12, 1963	10 days 30days SS
Elizabeth Elkind	Sept. 12, 1963	10 days 30days SS
Raymond G. Gardner	Sept. 12, 1963	10 days 30days SS
Lester Williams	Sept. 12, 1963	10 days 30days SS
Willie Blackman	Sept. 12, 1963	10 days 30days SS
Jules Older	Aug. 12, 1963	30 days
Joel Freedman	Sept. 9, 1963	10 days
Jeffrey Kalb	Sept. 9, 1963	10 days
Eleuterio Gonzalez	Sept. 9, 1963	10 days
Stuart Wechsler	Jan. 20, 1964	10 days + SS

SCHEDULE "A"	NOTICE OF APPEAL FILED	5 days or less
Joseph Lawson	May 30, 1963	Pen Ind. SS
Kurt Flashmer	May 30, 1963	Pen Ind. SS
Stevens Clark	May 30, 1963	Pen Ind. SS
Wesley Sutton	May 30, 1963	Pen Ind. SS
Vicki Morris	May 30, 1963	Pen Ind. SS
Velma Hill	May 30, 1963	Pen Ind. SS
Elizabeth	June 3, 1963	1 Year SS
Krin Berg	June 3, 1963	1 year SS
Edwin Lewinson	June 3, 1963	1 year SS
Stuart Wechslen	June 3, 1963	1 year SS
Patricia Walker	June 3, 1963	1 year SS
Gloria Bouknight	June 3, 1963	1 year SS
Christopher Peditto	June 3, 1963	1 year SS
Charles Wilson	June 3, 1963	1 year SS
Jane Burnett	June 3, 1963	1 year SS
Maurice Fredericks	June 3, 1963	1 year SS
Gilbert H. Banks	June 3, 1963	1 year SS
Arnold Goldwag	June 3, 1963	1 year SS
Thad Beebe	Nov. 8, 1963	$25 or 5+90days SS

Schedule "B"

None

CRIMINAL COURT OF THE
CITY OF NEW YORK - COUNTY OF QUEENS

People of the State of New York vs. Butler, et al., Defendants	NOTICE OF MOTION to Dismiss Complaints Charging Violations of P.L. 722-2, 1851 and 2036 or, in the Alternative, Motion to Make Complaints More Definite and Certain

Docket Numbers of Complaints under P.L. 722-2:
B2488, 2510, 2512, 2447, 2479, 2481, 2504
Docket Numbers of Complaints under P.L. 1851:
B2527, 2593, 2595, 2551, 2572, 2574, 2587
Docket Numbers of Complaints under P.L. 2036:
2405, 2427, 2429, 2364, 2396, 2398, 2421

S I R S:

PLEASE TAKE NOTICE that the undersigned will move this Court on May 25, 1964 at 9:30 a.m. or as soon thereafter as counsel can be heard, on behalf of defendants Chernofsky, Dravich, Feingold, Perlmutter, Statman, Tenney, and Zeifert, for an order dismissing the complaints charging such defendants with violations of P.L. 722-2, 1851, and 2036, or in the alternative, requiring that such complaints be made more definite and certain, on the ground that such complaints do not specify or indicate the time of day when such alleged violations were committed.

Dated: New York, New York
May 13, 1964

Yours, etc.,

NANETTE DEMBITZ
New York Civil Liberties Union
156 Fifth Avenue
New York 10, New York

Attorney for Defendants
Chernofsky, Dravich, Feingold,
Perlmutter, Statman, Tenney,
and Zeifert

To: Frank D. O'Connor, Esq.
District Attorney, Queens County
Queens County Criminal Court Bldg.
126-05 Hoover Avenue
Kew Gardens 15, New York

- -x

People of the State of New York :

vs. :

Butler, et al., :

Defendants :

- -x

Memorandum in Support of Motion to Dismiss Complaints under P.L. 722-2, 1851, and 2036, or in the Alternative, to Make Complaints More Definite and Certain

Each of these complaints charges a violation of law against over eighty defendants. None of the complaints states the time of dayoof the alleged violations by any or all the defendants. We contend that the complaints therefore lack sufficient specificity.

The "information must set such acts (the acts charged) out with the same clarity as an indictment." People v Grogan, 260 N.Y. 138, 142, 183 N.E. 273. A "complaint made by a police officer takes the place of the information and must meet the same requirements." People v Glaser, 2 A.D. 2d 352, 155 N.Y.Supp. 2d 700 (1st Dept, 1965).

"The right to a hearing is meaningless without notice." Walker v Hutchinson City, 352 U.S. 112, 115. Chisholm v Gilmer, 299 U.S. 99, 102. There must be adequate notice of the charge so that the defendant can intelligently prepare his defense. Other-

wise there is a violation of the due process guarantee of the State Constitution and of the Fourteenth Amendment of the Federal Constitution. Cole v Arkansas, 333 U.S. 196. The courts must protect the "defendant's right to be informed of the nature of the charge against him and the acts constituting it." People v Glaser, supra.

The extraordinary number of defendants makes notice of the time of the violations particularly vital to the preparation of a defense. Is the charge that all of the defendants committed the violations together? Or in different groups at different times but at the same location? Or in different groups at the same time in different locations in the same general area? There is no way of telling from this complaint.

A defendant cannot know whether to move for a severance from one or all the other defendants. Nor can he know what witnesses to call for his defense, without knowledge of the time when the prosecution claims his violation occurred. No defendant can be convicted on the basis of guilt by association; each is entitled to notice of his alleged individual violation so he can defend himself individually. This complaint does not give each defendant notice of the charge against him adequate to enable him to prepare his defense.

In addition, it is a cardinal principle that a complaint must be based on firsthand information (or if not, that the sources of information must be described.) See People v Taylor, 159 Misc.

536, 289 N.Y. Supp. 668 (County Court, Nassau, 1936.) The absence of any specification as to time seems to reflect a lack by the complainant of firsthand observation of the alleged violations.

C O N C L U S I O N

It is respectfully submitted that the complaints must be dismissed; or in the alternative, that an order issue for their dismissal unless the time of the alleged violations by each defendant is supplied by the complainant.

Respectfully submitted,

NANETTE DEMBITZ
New York Civil Liberties Union
156 Fifth Avenue
New York 10, New York

Attorney for Defendants
Chernofsky, Dravich, Feingold,
Perlmutter, Statman, Tenney,
and Zeifert

CRIMINAL COURT OF THE
CITY OF NEW YORK - COUNTY OF QUEENS

People of the State of New York vs. Butler, et al., Defendants	NOTICE OF MOTION to Dismiss Complaint Charging Violation of P.L. 2036

Docket Numbers of Complaints under P.L. 2036:
2405, 2427, 2428, 2364, 2396, 2398, 2421

S I R S:

PLEASE TAKE NOTICE that the undersigned will move this Court on May 25, 1964 at 9:30 a.m. or as soon thereafter as counsel can be heard, on behalf of defendants Chernofsky, Dravich, Feingold, Perlmutter, Statman, Tenney, and Zeifert, for an order dismissing the complaint charging such defendants with a violation of P.L. 2036, on the ground that the facts alleged in the complaint do not constitute such a violation and show that no violation of P.L. 2036 was committed by such defendants.

Dated: New York, New York
May 13, 1964

Yours, etc.

NANETTE DEMBITZ
New York Civil Liberties Union
156 Fifth Avenue
New York 10, New York

Attorney for Defendants
Chernofsky, Dravich, Feingold,
Perlmutter, Statman, Tenney

To: Frank D. O'Connor, Esq.
District Attorney, Queens County
Queens County Criminal Court Bldg.
126-05 Hoover Avenue
Kew Gardens 15, New York

- - - - - - - - - - - - - - - - - - -x

People of the State of New York

vs.

Butler, et al,
Defendants

- - - - - - - - - - - - - - - - - - -x

Memorandum in Support of Motion to Dismiss

Complaint Charging Violation of P.L. 2036

On behalf of defendants Chernofsky, Dravich, Feingold, Perlmutter, Statman, Tenney, and Zeifert, this motion is made to dismiss the complaint charging them with violation of P.L. 2036 on the ground that the facts alleged in the complaint do not, as a matter of law, constitute such a violation. The elements of the crime punishable under P.L. 2036 are not established by the allegations of the complaint.

P.L. 2036 reads: "Unlawful Intrusion on Real Property: A person, who intrudes upon any lot or piece of land within the bounds of a city or village, without authority from the owner thereof, or who erects or occupies thereon any hut, or other structure whatever without such authority; and a person who places, erects, or occupies within the bounds of any street or avenue of a city or village, any hut, or other structure, without lawful authority, is guilty of a misdemeanor."

It is apparent from the language of this section, even read without the enlightenment of history or court interpretation,

that it was intended to punish conduct in the nature of "squatting" or deliberate disregard of the title of an owner of real property. And this view of P.L. 2036 has been authoritatively established by the Court of Appeals. In People v Stevens, 109 N.Y. 159, 16 N.E. 53(1888), the Court of Appeals pointed out that P.L. 2036 was a reenactment of Section 467 of the Penal Code which punished those who "intrude or squat" on real property. While the term "squat" was omitted from 2036, the purpose was the same as the prior section, and it was primarily to punish "lawless intrusions, especially on vacant lands...without the knowledge of the owners." It is apparent that the conduct charged in the complaint is outside the intended scope of P.L. 2036.

Further, in Stevens, the Court of Appeals specifically held that the defendant could not be convicted under 2036 unless he entered upon the land with the knowledge that "he had no right to do so and with the intent and purpose of unlawfully depriving the owner of the possession of the property."

The lower courts have followed this holding. See Kilroy v News Syndicate Co., 32 N.Y. Supp. 2d 210(Sup., Kings, 1941), affmd. 263 A. D. 961(1942): The defendant must have such "unlawful and criminal intent when transgressing" upon the property. See also People v Winig, 7 Misc. 2d 803, 163 N.Y. Supp. 2d 995 (Columbia County Ct., 1957): Unless the defendant has knowledge that he is entering on another person's land without his permission, he does not have the criminal intent requisite for a violation of P.L. 2036.

And see People v. Leiby, 184 Misc. 21, 52 N.Y. Supp. 2d 493 (City Court, Utica, 1945): "Lack of authority from the owner of the land is an integral part of the crime of intruding upon such land." See also Hewitt v. Newburger, 141 N.Y. 538, 36 N.E. 593 (1894).

Accordingly, the complaint does not charge the conduct or intent requisite for a violation of P.L. 2036, and it is apparent from the face of the complaint that there was no such violation. The land, on which the Schaefer Exhibit stands, is leased, as the complaint states, from the World's Fair Corporation. As this court may judicially notice, such land is in turn leased by that Corporation from the City of New York. There is no allegation of defendants' intent to deprive the City of New York of the possession of this land, and it is obvious from the allegations that there was no such intent. Further, it is apparent from the allegations that there was no lack of authorization by the owner for defendants' entrance onto the property. There is not even an allegation that defendants entered upon the property without the payment of the admission fee (although we do not mean that such nonpayment would be sufficient to establish a violation of 2036.)

The most that the complaint shows is that after defendants entered on the property with the authority of the owner, the lessee requested them to leave.

The property is not the type to which 2036 relates; the entrance was not without authority of the owner; defendants had

no intent to deprive the owner of possession of the property. All of these deficiencies in the complaint, as a complaint to charge a violation of P.L. 2036, are apparent on its face.

C O N C L U S I O N

The complaint does not allege facts necessary to constitute a violation of P.L. 2036 and the allegations instead show that no violation could have been committed. On the face of the complaint and as a matter of law, the complaint is deficient and must be dismissed.

Respectfully submitted,

NANETTE DEMBITZ

New York Civil Liberties Union
156 Fifth Avenue
New York 10, New York

Attorney for Defendants
Chernofsky, Dravich, Feingold,
Perlmutter, Statman, Tenney,
and Zeifert

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - -

At a Special Term Ex Parte
of the United States District
Court held in and for the
Eastern District of New York, at
the Courthouse,

on the day of , 1965

PRESENT:

HON.

DISTRICT JUDGE

- x

ERIC EISENBERG, ROBERT HARRIS, RANDY MERIN, EUGENE SHERMAN, EUGENE TOURNOUR, BILL BROWN, JIMMIE CLARK, KAREN COHEN, PHYLLIS CORBETT, VERNAL GRIPPER, LAURRAS HOBBS, LOREN JENKINS, FRANK ROBERSON, LUCILLE PLUMMER, EDWARD ROBERTS, and PRISCILLA STEVENS,

New Names

Petitioners,

64C 886

-against-

ORDER

PEOPLE OF THE STATE OF NEW YORK

Respondent.

- x

The above named petitioners, having been charged under SS 722 and 1851 of the Penal Law of the State of New York, and having removed the prosecution of the said action to this Court on September 2, 1964, along with 25 other petitioners similarly charged under the said Penal Law, and having by Counsel entered into a stipulation with the District Attorny of Queens County and the Attorney General of the State of New York, in which all parties thereto consent, remanding the prosecution of the said petitioner* case to the Criminal Court of the City of New York, County of Queens, ~~without prejudice to any of the other petitioners similarly situated,~~

NOW, upon reading and filing the Stipulation dated the day of , 1965, and upon the proceedings held heretofore in the Criminal Court of the City of New York; the

MOTION is granted and it is,

ORDERED that, as regards the petitioners, ERIC EISENBERG, ROBERT HARRIS, RANDY MERIN, EUGENE SHERMAN, EUGENE TOURNOUR, BILL BROWN, JIMMIE CLARK, KAREN COHEN, PHYLLIS CORBETT, VERNAL GRIPPER, LAURRAS HOBBS, LOREN JENKINS, FRANK ROBERSON, LUCILLE PLUMMER, EDWARD ROBERTS, and PRISCILLA STEVENS, this case is

Substitute new names

REMANDED to the Criminal Court of the City of New York, County of Queens, for all purposes, without prejudice to the cases of the remaining petitioners similarly situated,

SO ORDERED:

U. S. D. J.

CRIMINAL COURT OF THE CITY OF NEW YORK

PART I-B: COUNTY OF QUEENS

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The People of the State of New York	:	Dockets: B2772
on complaint of	:	B2773
Capt. Frank Monahan, World's Fair Police	:	B2774 B2775 B2776
-against-	:	B2777 B2778
BETTY COLLINS, DORIS RUTLEDGE, SHERRY NOYES, CAROL LUSTGARTEN,	:	B2779 Charge: Viol. Sec. 722, subd. 2 and 4, P.L.
Defendants.	:	Viol. Sec. 2036, Penal Law

----------X

June 11, 1964 Th

B e f o r e:

HON. GEORGE BALBACH, Judge.

THE COURT: Defendants are charged with violating Section 722, subdivision 2 and 4 of the Penal Law, disorderly conduct, and Section 2036 of the Penal Law, unlawful intrusion on Real Property. They move to dismiss the charges before pleading thereto, asserting that the acts set forth in the complaints do not constitute a crime under the constitution and laws of the United States and the State of New York.

The court is limited in consideration of the motion to the statements as set forth in the complaint, and which must be deemed to be admitted for the purpose of this motion and the pertinent sections of law pertaining thereto, which statutory provisions need not be alleged in the complaint.

The complaint charging a violation of Section 722 of the Penal Law, subdivisions 2 and 4, are on complaint of Captain Frank Monahan of the World's Fair Police Department in which he alleges that on April 28, 1964, at about 2 p.m., at the World's Fair site in front of the Florida exhibit in the County of Queens, City and State of New York, the defendants Betty Collins, Doris Rutledge, Sherry Noyes and Carol Lustgarten committed the offense of disorderly conduct in violation of Section 722, subdivision 2 and 4 of the Penal Law, in that with intent to provoke a breach of the peace and under circumstances wehreby a breach of the peace might be occasioned the defendants did picket and carry picket signs in front of the above pavilion, thereby did annoy, disturb and interfere with persons in the vicinity and did obstruct the sidewalk to the annoyance of persons wishing to use the said facilities and did thereby cause a crowd to collect on the sidewalk. The complaint further states the defendants were asked by deponent on three occasions to desist from such conduct and did refuse to desist. It further states that the complainant advised the defendants that the New York World's Fair 1964-65 Corporation, a lessee and custodian of said Fair site had adopted and published a regulation that prohibits demonstrations and picketing on the Fair site without written permission of the Fair Corporation and prohibits persons from entering the Fair with placards which may be used in unauthorized demonstrations and states that after being informed of said regulations the defendants continued their picketing without authorization and were placed under arrest.

The complaint charging a violation of Section 2036 of the Penal Law, likewise on the complaint of Captain Monahan, charges that on the same date and at the same location at 2 p.m. the defendants violated Section 2036 of the Penal Law in that at that time and place they carried picket signs in violation of a duly adopted and published regulation of the New York World's Fair 1964-65 Corporation, that the Corporation as lessee, being the lawful custodian of the real property on which said acts of the defendants took place and which regulations prohibit picketing or other similar acts on the Fair site without written permission and which regulations also prohibit persons from entering the Fair site with placards, handbills or other materials which may be used in an unauthorized demonstration on said Fair site, which regulations further provide that any person violating this regulation is a trespasser subject to arrrest. The complainant ascertained that the defendants did not have a permit issued by the World's Fair Corporation. The complainant, Captain Monahan, a captain in the World's Fair Police Force duly and legally established by the World's Fair 1964-65 Corporation did identify himself to the defendants and stated that he represented the custodian of said property. He states in his complaint that on three occasions he did warn the defendants of the contents of the aforementioned Fair Corporation's regulations and stated that by their unlawful conduct they were trespassing and intruding upon the property, the real property of said Fair Corporation and were no longer on said property lawfully and with the consent of the Corporation. He states he also warned each of said defendants on each of said three occasions to desist in such unlawful conduct or they would be subject to arrest. Each of the defendants, he states, did refuse to desist and were then placed under arrest.

Defendants, on oral argument through counsel, insist, number one, that the property occupied under lease by the New York World's Fair 1964-65 Corporation is not private property, and, two, that whatever private attributes it may have is negatived by statutes and constitutional provisions. Defendants appear through voluntary counsel of the Civil Liberties Union. The New York World's Fair 1964-65 Corporation - which I will hereinafter refer to as the Fair - appears as Amicus Curiae. The People are represented by the District Attorney of this County.

The Fair was chartered under the Membership Corporations Law of the State of New York and subsequently, and on May 27, 1960, the City of New York entered into a lease with the Fair which lease was ratified, legalized and validated, notwithstanding any provisions of the New York City Charter or any provision of the Administrative Code of the City of New York, or any other act or law or any defect, irregularity or omissions in such lease and amendments thereto, or in the execution thereof or lack of statutory authority therefor, and that validation and ratification was by Chapter 909 of the Laws of 1961.

The Agreement of Lease dated May 27, 1960, was approved by the Board of Estimate June 10, 1960 by resolution, calendar number 272(b), and was printed in the Journal of Proceedings of the Board of Estimate on June 23, 1960, under calendar number 431. The lease and proceedings authorizing execution, adoption and approval of same, being public records, the court takes judicial notice thereof.

Article 8 of the lease requires the Fair to provide a police force and a fire department force. The use under the terms of the lease to which the property may be put is contained in Article 4 of the lease.

Chapter 892 of the Laws of 1963 as amended by Chapter 580 of the Laws of 1964, effective on April 18, 1964, defines the status of the police force provided by the Fair, and defines the status of certain streets, roads, highways, sidewalks and walkways in the area under the jurisdiction of the Fair. Section 3 of the Amending Statute, Chapter 580, of the Laws of 1964, which is the pertinent section, reads as follows:

"A violation of any provision of law relating to safety, regulation of traffic or the preservation of order occurring at or on the streets, roads, highways, sidewalks, walkways, parking fields, parking areas, parking facilities or bus terminals of the property under jurisdiction of the New York World's Fair 1964-65 Corporation shall be deemed to have occurred on a public street, road, highway, sidewalk, walkway, parking field, parking area, parking facility or bus terminal and not on private property, and such parking fields, parking areas parking facilities and bus terminals shall be deemed streets, roads or highways..."

The section then goes on to say that:
"This act shall not, however, affect the private property status of such streets, roads, highways, walkways, parking fields, parking areas, parking facilities or bus terminals for the purposes of subdivision 14 of Section 61 of the Public Service Law or for the purposes of any law, act or ordinance relating to taxation or licensing, or for regulatory or for any other purposes, nor shall this act or any other law, act or ordinance be deemed to require the registration of such vehicles as may be authorized by the New York World's Fair 1964-65 Corporation for use, operation or display within the property under the jurisdiction of said corporation, which vehicles are used, operated or displayed solely thereat or to require the licensing of the owners, chauffeurs, operators or drivers of such vehicles." That's the end of quotation of Section 3.

The matter for determination with respect to the charges against these defendants is whether or not the facts set forth in the complaints sufficiently spell out a crime. The answer depends on the determination as to the nature of the property right of the Fair in and to the property under lease, namely whether private or public.

This case is not one wherein the title, possession and use are exclusively in the municipality but is one wherein the possession and use are wholly in the lessee, the Fair, subject to certain provisions as stated in the lease. Possession carries with it the right to adopt rules and regulations consistent with the use stated.

The use stated, Article 4 of the lease, is to conduct a World's Fair and any and all activities pertaining thereto. The benefit of such use is available to those who fulfill the requirements of the lessee. Payment of an admission charge is authorized and the Fair may do all other things that may be necessary for of appertain to the successful preparation, completion and operation of the World's Fair.

The court adds to the foregoing the provisions of Chapter 580 of the Laws of 1964 herein referred to.

The enabling legislation, the lease provisions and the statute declaring the private property status of the streets, the thoroughfares already referred to, all sustain the private nature of the Fair operation and the property over which it has possession.

However, it is the contention of the defendants that the

provision of Chapter 580, Section 3, puts these streets into the class of public thoroughfares.

The court finds to the contrary since the statute specifically states that the streets do not lose their private status. Only for the purpose of violations are they deemed public. A further indication that the Legislature intended the thoroughfares to be private are the provisions exempting vehicles used wholly within the Fair proeprty or under its jurisdiction from registration and permitting operation thereof by unlicensed operators. A further observation with respect to Section 580 is made by the court, namely that such provision is necessary so that a criminal may not seek refuge or avoid penalties of the law by contending that certain acts are not unlawful because they were committed on private property.

The facts alleged in each complaint sufficiently charge the defendants with the offense of disorderly conduct and the crime of unlawful intrusion on Real Property. Picketing, peaceful or not, is a violation of the rules and regulations adopted by the Fair. Such violation is one practiced against a private owner, namely the lessee, the Fair, and as such is the proper subject for a criminal charge. The court refers to People against Rozensweig, 171 Misc. 702, also cited in 13NY Supp. (2) 795, a case involving picketing at the New York World's Fair, 1939, in which the opinion was written by Hon. Jenkin R. Hockert, City Magistrate. [Peaceful picketing may be conducted along public thoroughfares subject to reasonable restraints, but the prohibition of picketing on private property used for exhibition purposes is not, in the opinion of the court, violative of any constitution or statutory provisions.]

With respect to the charge of violating Section 2036 of the Penal Law, the defendants became intruders when they violated the rules against picketing. A lawful entry may become unlawful by virtue of acts committed on the property of another and may become unlawful even on public property. (People vs. Lawson, 238 NY Supp (2)839; and People vs. Martinez, NY City Criminal Court, docket numbers B2389, 2390, 2391, 2392.

The facts in the case of Marsh vs. Alabama, 326 U.S. 501, cited by the defendants, are not similar to the case involved.

The applicatons, in the form of a demurrer, to dismiss the charges are denied.

June 17, 1964

Office of the Clerk
New York City Criminal Court
Queens County
125-01 Queens Boulevard
Kew Gardens, New York

Re: People vs. Jay Dravich
Docket No. 1603
1604
1605

Gentlemen:

It is necessary that I secure the return of all photographs and fingerprints taken by the Police Department of the City of New York on the date of my arrest.

In order to secure the return of said photographs and fingerprints, a Certificate of Disposition is necessary to fulfill the requirements of the Police Department.

On June 17, 1964, the charge of Resisting arrest, Disorderly Conduct, Trespassing on Private Property against me was dismissed in Part III of the New York City Criminal Court, County of Queens. Will you kindly forward to the undersigned the proper Certificate of Disposition in this matter. My check in the sum of $1.00 is enclosed.

Very truly yours,

Signed: Jay Dravich

Name: JAY Dravich
(please print)

Address: 81-10 135th St.
Kew Gardens 35, N.Y.

June 17, 1964

Office of the Clerk
New York City Criminal Court
Queens County
125-01 Queens Boulevard
Kew Gardens, New York

Re: People vs. Elinor Lerner
Docket No. 1211
1284

Gentlemen:

It is necessary that I secure the return of all photographs and fingerprints taken by the Police Department of the City of New York on the date of my arrest.

In order to secure the return of said photographs and fingerprints, a Certificate of Disposition is necessary to fulfill the requirements of the Police Department.

On June 17, 1964, the charge of 1851 Disorderly Conduct

against me was dismissed in Part _____ of the New York City Criminal Court, County of Queens. Will you kindly forward to the undersigned the proper Certificate of Disposition in this matter. My check in the sum of $1.00 is enclosed.

Very truly yours,

Signed: Elinor Lerner

Name: Elinor Lerner
(please print)

Address: 160 Oakland St.
Rockville, N.Y.

June 17, 1964

Office of the Clerk
New York City Criminal Court
Queens County
125-01 Queens Boulevard
Kew Gardens, New York

Re: People vs. Jeffrey Katz
Docket No. 1263
1276

Gentlemen:

It is necessary that I secure the return of all photographs and fingerprints taken by the Police Department of the City of New York on the date of my arrest.

In order to secure the return of said photographs and fingerprints, a Certificate of Disposition is necessary to fulfill the requirements of the Police Department.

On June 17, 1964, the charge of 1851, 722

against me was dismissed in Part III of the New York City Criminal Court, County of Queens. Will you kindly forward to the undersigned the proper Certificate of Disposition in this matter. My check in the sum of $1.00 is enclosed.

Very truly yours,

Signed: Jeffrey Katz

Name: JEFFREY KATZ
(please print)

Address: 1800 DAVIDSON AVE
BRONX NY 10453

17 of June, 1964

Office of the Clerk
New York City Criminal Court
Queens County
125-01 Queens Boulevard
Kew Gardens, New York

Re: People vs. Andrew McLaughlin
Docket No. 1265-1278

Gentlemen:

It is necessary that I secure the return of all photographs and fingerprints taken by the Police Department of the City of New York on the date of my arrest.

In order to secure the return of said photographs and fingerprints, a Certificate of Disposition is necessary to fulfill the requirements of the Police Department.

On 17 of June, 1964, the charge of disorderly conduct and resisting arrest against me was dismissed in Part III of the New York City Criminal Court, County of Queens. Will you kindly forward to the undersigned the proper Certificate of Disposition in this matter. My check in the sum of $1.00 is enclosed.

Very truly yours,

Signed: Andrew McLaughlin

Name: Andrew McLaughlin
(please print)

Address: 437 Tarrytown Rd.
White Plains, N.Y.

June 17, 1964

Office of the Clerk
New York City Criminal Court
Queens County
125-01 Queens Boulevard
Kew Gardens, New York

Re: People vs. B. RUSHING
Docket No. # 1267
1280

Gentlemen:

It is necessary that I secure the return of all photographs and fingerprints taken by the Police Department of the City of New York on the date of my arrest.

In order to secure the return of said photographs and fingerprints, a Certificate of Disposition is necessary to fulfill the requirements of the Police Department.

On June 17, 1964, the charge of 722 PL 1851 PL against me was dismissed in Part III of the New York City Criminal Court, County of Queens. Will you kindly forward to the undersigned the proper Certificate of Disposition in this matter. My check in the sum of $1.00 is enclosed.

Very truly yours,

Signed: Byron Rushing

Name: BYRON RUSHING
(please print)

Address: 706 ALMOND ST.
SYRACUSE, N.Y.

June 17, 1964

Office of the Clerk
New York City Criminal Court
Queens County
125-01 Queens Boulevard
Kew Gardens, New York

Re: People vs. Lawrence Rushing
Docket No. #1268
#1281

Gentlemen:

It is necessary that I secure the return of all photographs and fingerprints taken by the Police Department of the City of New York on the date of my arrest.

In order to secure the return of said photographs and fingerprints, a Certificate of Disposition is necessary to fulfill the requirements of the Police Department.

On June 17, 1964, the charge of Disorderly Conduct - 722 Resisting Arrest 1851 against me was dismissed in Part III of the New York City Criminal Court, County of Queens. Will you kindly forward to the undersigned the proper Certificate of Disposition in this matter. My check in the sum of $1.00 is enclosed.

Very truly yours,

Signed: Lawrence H. Rushing

Name: Lawrence H. Rushing
(please print)

Address: 170-18 118 Ave
Jamaica 34, N.Y.

June 17, 1964

Office of the Clerk
New York City Criminal Court
Queens County
125-01 Queens Boulevard
Kew Gardens, New York

Re: People vs. D. Chernotsky
Docket No. 1606 1607
1608

Gentlemen:

It is necessary that I secure the return of all photographs and fingerprints taken by the Police Department of the City of New York on the date of my arrest.

In order to secure the return of said photographs and fingerprints, a Certificate of Disposition is necessary to fulfill the requirements of the Police Department.

On June 17, 1964, the charge of 1851 D.C. 2, 4 against me was dismissed in Part B of the New York City Criminal Court, County of Queens. Will you kindly forward to the undersigned the proper Certificate of Disposition in this matter. My check in the sum of $1.00 is enclosed.

Very truly yours,

Signed: Daniel Chernotsky

Name: Daniel Chernotsky
(please print)

Address: 333 Ovington Ave.
Bklyn. N.Y.

6/19, 1964

Office of the Clerk
New York City Criminal Court
Queens County
125-01 Queens Boulevard
Kew Gardens, New York

Re: People vs. Pam
Docket No. 1424
1348

Gentlemen:

It is necessary that I secure the return of all photographs and fingerprints taken by the Police Department of the City of New York on the date of my arrest.

In order to secure the return of said photographs and fingerprints, a Certificate of Disposition is necessary to fulfill the requirements of the Police Department.

On 6/19, 1964, the charge of 1851 PL 722-2 & 4 2036 against me was dismissed in Part III of the New York City Criminal Court, County of Queens. Will you kindly forward to the undersigned the proper Certificate of Disposition in this matter. My check in the sum of $1.00 is enclosed.

Very truly yours,

Signed: Robert Pam

Name: Robert Pam
(please print)

Address: 75-66 113th St.
Forest Hills 75, NY.

June 19, 1964

Office of the Clerk
New York City Criminal Court
Queens County
125-01 Queens Boulevard
Kew Gardens, New York

Re: People vs. Federica Canada
Docket No. 1346
1422
1408

Gentlemen:

It is necessary that I secure the return of all photographs and fingerprints taken by the Police Department of the City of New York on the date of my arrest.

In order to secure the return of said photographs and fingerprints, a Certificate of Disposition is necessary to fulfill the requirements of the Police Department.

On ~~April 22~~ June 19, 1964, the charge of 122.24, 185.1 203.6 against me was dismissed in Part 3 III of the New York City Criminal Court, County of Queens. Will you kindly forward to the undersigned the proper Certificate of Disposition in this matter. My check in the sum of $1.00 is enclosed.

Very truly yours,

Signed: Federica Canada

Name: Federica Canada
(please print)

Address: 110-29 172 St
St. Albans 32, N.Y.

June 21, 1964, 1964

Office of the Clerk
New York City Criminal Court
Queens County
125-01 Queens Boulevard
Kew Gardens, New York

Re: People vs. Diane Weinerman
Docket No. 1345
1407
*(I believe I had a third number, but it was not listed on June 19th).

Gentlemen:

It is necessary that I secure the return of all photographs and fingerprints taken by the Police Department of the City of New York on the date of my arrest.

In order to secure the return of said photographs and fingerprints, a Certificate of Disposition is necessary to fulfill the requirements of the Police Department.

On June 19th, 1964, the charge of 2036; 722-2+4; and 1851

against me was dismissed in Part III of the New York City Criminal Court, County of Queens. Will you kindly forward to the undersigned the proper Certificate of Disposition in this matter. My check in the sum of $1.00 is enclosed.

Very truly yours,

Signed: Diane Weinerman

Name: Diane Weinerman
(please print)

Address: 205 W. End Ave. (5H)
N.Y. 23, New York

June 20, 1964

Office of the Clerk
New York City Criminal Court
Queens County
125-01 Queens Boulevard
Kew Gardens, New York

Re: People vs. BRUCE GLUSHAKOW
Docket No. 1351
1413
1423

Gentlemen:

It is necessary that I secure the return of all photographs and fingerprints taken by the Police Department of the City of New York on the date of my arrest.

In order to secure the return of said photographs and fingerprints, a Certificate of Disposition is necessary to fulfill the requirements of the Police Department.

On June 19, 1964, the charge of 2036, 1851, 722-2 against me was dismissed in Part III of the New York City Criminal Court, County of Queens. Will you kindly forward to the undersigned the proper Certificate of Disposition in this matter. My check in the sum of $1.00 is enclosed.

Very truly yours,

Signed: Bruce Glushakow

Name: BRUCE GLUSHAKOW
(please print)

Address: Apt. 18
85 East THIRD St.
New York 3, New York

June 19, 1964

Office of the Clerk
New York City Criminal Court
Queens County
125-01 Queens Boulevard
Kew Gardens, New York

Re: People vs. Laura Weinstone
Docket No. 1358
1420
1434

Gentlemen:

It is necessary that I secure the return of all photographs and fingerprints taken by the Police Department of the City of New York on the date of my arrest.

In order to secure the return of said photographs and fingerprints, a Certificate of Disposition is necessary to fulfill the requirements of the Police Department.

On June 19, 1964, the charge of 722-244, 2036, 1851

against me was dismissed in Part 3 of the New York City Criminal Court, County of Queens. Will you kindly forward to the undersigned the proper Certificate of Disposition in this matter. My check in the sum of $1.00 is enclosed.

Very truly yours,

Signed: Laura Weinstone

Name: Laura Weinstone
(please print)

Address: 39-67-47th street
Long Island City 4, New York

July 14, 1964

Office of the Clerk
New York City Criminal Court
Queens County
125-01 Queens Boulevard
Kew Gardens, New York

Re: People vs. Nelson Rust Gilbert
Docket No. 1347
1409
1423

Gentlemen:

It is necessary that I secure the return of all photographs and fingerprints taken by the Police Department of the City of New York on the date of my arrest.

In order to secure the return of said photographs and fingerprints, a Certificate of Disposition is necessary to fulfill the requirements of the Police Department.

On June 19, 1964, the charge of #2036 722-274 #1851

against me was dismissed in Part III of the New York City Criminal Court, County of Queens. Will you kindly forward to the undersigned the proper Certificate of Disposition in this matter. My check in the sum of $1.00 is enclosed.

Very truly yours,

Signed: Nelson Rust Gilbert

Name: NELSON RUST GILBERT
(please print)

Address:

S M T W T F S
1
8
15

QUERY

LEGAL RESEARCH BY SPERRY RAND'S UNIVAC III

LAW RESEARCH SERVICE/INC.

Sperry Rand Building, 1290 Avenue of the Americas, New York, N.Y. 10019 Telephone: LT 1-9400

Please type or write plainly

Mail white and blue copies to Law Research Service

Name: George Schiffer

Firm:

Address: 40 East 49th Street

City: New York 17 N.Y.

- ☐ Negligence
- ☐ Auto
- ☐ Bldg. & Sidewalk
- ☐ Real Property
- ☐ Personal Property
- ☐ Corporations
- ☐ Estates
- ☐ Taxation
- ☐ Evidence-Pleading
- ☐ Domestic Relations
- ☒ Criminal Law
- ☐ Contracts
- ☐ Damages
- ☐ Other—specify:

Member's Code # nyo5071f4 Date 6/11/64 ☐ Check enclosed ☐ Out-of-State Member

I request the relevant cases regarding the conditions under which the court should excercise its discretion,pursuant to §32 ,N.Y.C.Crim.Ct. act,to certify that a misdemeanor charge be ~~tried~~ prosecuted by indictment.The charge is resisting arrest,Penal Law §1851.

Background of my request is as follows: Defendants,in the course of a civil rights demonstration, blocked the doors of a subway car.Two of them lay between the tracks in front of the train. Pursuant to a philosophy of non-cooperation, defendants did not walk to police vehicles upon their arrest for disorderly conduct (§722) but had to be carried by officers.No actual resistance was offered.

(If more space is needed, continue on reverse side.)

UPDATING

Case (1)	Case (2)	Case (3)	Case (4)	Case (5)
35 Mad 216 (228 NYS2d 981)	280 AD 698 17 NYS2d 313	19 M 2d 331 (185 NYS2d 907)		
173 M 685 (185 2d 897) (185 2d 896) 173 M 691	161 M 405 (292 S 483) aff 251 AD 707 (298 NYS 188)	162 M 9 (292 S 481)	204 M 859 (128 S2d 725)	

Br Brette '63 242 S2d 918.

organization with affiliated local groups working

CONGRESS OF RACIAL EQUALITY

CORE

to abolish racial discrimination by direct, nonviolent methods

38 PARK ROW
NEW YORK 38, NEW YORK
COrtlandt 7-6270

James Farmer
national director
Richard Haley
associate
Gordon Carey
assistant
Carl Rachlin, Esq.
general counsel

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Martin Luther King
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treasurer
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CORElator editor

STAFF
Norman Hill
program director
James McCain
director of organization
Marvin Rich
community relations director

July 9, 1964

George Schiffer, Esq.
40 East 49th Street
New York, New York

Dear George:

Enclosed is an affidavit from Donald Alper, who is in default at the World's Fair. I told the young man's mother on the phone, and an attorney who called me on his behalf, that Donald could not possibly be told what he seems to think he has been told, but that nevertheless we would try to re-set the date.

No promises were made.

Sincerely,

Carl rrl

Carl Rachlin
General Counsel

CR:rrl

Enc.

A F F I D A V I T

STATE OF CALIFORNIA)
) SS
COUNTY OF ALAMEDA)

TO THE JUDGE OF QUEENS COUNTY COURT:

DONALD B. ALPER, being duly sworn, deposes and says:

He was ordered to appear in Queens County Criminal Court, New York City, New York, on or about June 11, 1964; that your affiant understood that charges had been dropped as a result of a telephone conversation with CORE attorneys; that he has just learned that a bench warrant has been issued for his arrest, and his bond cancelled for non-appearance;

That about June 9, 1964, your affiant talked by telephone to an assistant of Mr. Racclin and understood this attorney to say that the trial would be June 17, but that charges were to be dropped against all out of state residents of New York; that as a result of this conversation, your affiant felt that it was unnecessary to appear in Court since he was a resident of the state of Massachusetts;

Your affiant further states that he will undertake to appear in your Court on reasonable notice from his attorney; that failure to appear was unintentional;

WHEREFORE, your affiant respectfully requests that the bench warrant be withdrawn and the bond reinstated.

Donald B. Alper
DONALD B. ALPER

Subscribed and sworn to before me
this 3rd day of July, 1964.

Phyllis E. Washburn
Phyllis E. Washburn, Notary Public
in and for County of Alameda, State
of California.
My commission expires April 19, 1967.

JUL 6 1964

a national organization with affiliated local groups working

CONGRESS OF RACIAL EQUALITY

CORE

to abolish racial discrimination by direct, nonviolent methods

38 PARK ROW
NEW YORK 38, NEW YORK
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James Peck
CORElator editor

STAFF
Norman Hill
program director
James McCain
director of organization
Marvin Rich
community relations director

203-
442-3314

July 16, 1964

Jules Zalon, Esq.
Schiffer and Cohen
40 East 49th Street
New York, New York

Dear Jules:

I understand that Thomas Bieber was granted an adjournment, but I see that he is on the warrant list. Would you please let me know the current status of his case.

I am enclosing three copies of his mother's affidavit.

Regards,

Carl rrl

Carl Rachlin
General Counsel

CR:rrl

Enc.: 3

STATE OF CONNECTICUT

County of New London

Tamara BIEBER, 3 Totoket Road, Quaker Hill, Connecticut

being duly sworn deposes and says:

I am the mother of Thomas BIEBER, student at Columbia University, New York, N.Y. It is of the utmost importance that Tom will be able to go abroad with me this summer, from June 9 to July 16, for family reasons. May I point out that my mother and father, as well as 12 members of my direct family, have been killed in the Auschwitz concentration camp . We are planning to visit one of the few relatives we have left : Mrs. Chava Shind, in Israel. Mrs. Shind suffered a heart-attack this past January; this trip was planned for this summer and before her health deteriorates further. Most important family matters have to be talked over and decided and it is essentiel that Tom be present.

We were able to make reservations on a chartered plane which reduces the expenses almost half.

Duly sworn this twenty-sixth day of May 1964

Tamara Bieber

Personally appeared, Tamara Bieber, signer of the above instrument.

Doris E. Papp
Notary Public

My Commission Expires April 1, 1969.

New London, Conn.
May 26, 1964

Tom Bieber, being duly sworn, deposes and says:

In consideration of one dollar ($1.00) , payment of which is hereby acknowledged, I hereby release the World's Fair 1964-1965 Corporation, the Pinkerton Agency, The City of New York, The Schaefer Brewing Company,the particular arresting officers, and all employees, agents, and servants of the abovementioned parties, from any and all liability arising out of my arrest on April 22, 1964.

Tom Beiber

Sworn to before me this
7th day of August, 1964

NOTORY PUBLIC

LB 64/644 U. F. 49

POLICE DEPARTMENT
CITY OF NEW YORK
NEW YORK, N. Y., 10013

AUG 31 1964

George Schiffer, Esq.
40 East 49th Street
New York, N.Y. 10017

Dear Mr. Schiffer:

Your communication dated August 19, 1964, requesting copies of the Police Department regulations, has been referred to the undersigned.

The authority for the head of an agency to make rules and regulations for the conduct of his office or department is found in § 1105 of the New York City Charter.

Please be advised that the regulations of this Department are not made available for public distribution, but a copy is available for reference at the Municipal Reference Library, Municipal Building, New York, N. Y. 10007.

Very truly yours,

LEONARD E. REISMAN
Deputy Commissioner
Legal Matters

HS:rs

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS

- x

PEOPLE OF THE STATE OF NEW YORK,

v.

ERIC EISENBERG, ROBERT HARRIS, RANDY MERIN, EUGENE SHERMAN, STEVEN PETERS, MARTIN RUBIN, ANDY YOUNG, ALBERT ADKINS, BILL BROWN, MARSHALL BROWN, JIMMIE CLARK, KAREN COHEN, PHYLLIS CORBETT, HENRY DOCTOR, PATRICIA DUE, RICHARD GORDON, BERNALL GRIPPER, LANORRES HOBBS, LOREN JENKINS, LANE PERDU, LUCIELLE PLUMMER, FRANK ROBERSON, EDWARD ROBERTS, EUGENE SKLAR, PRICILLA STEPHENS, FREDERICK WEST, FRANKLIN ANDERSON, HOLLY BAUMAN, RONNIE COOK, JIMMIE JONES, WILLIAM JONES, WILLIAM LITTLE, KARL REER, FRANCES TAYLOR, SANDRA TAYLOR, IGAL RODENKO, DONALD ALPER, PAUL DAVIS, JAMES PEAKE, JR., EUGENE TOURNOUR and PAUL JASPER,

Defendants.

- x

TO: THE CLERK OF THE CRIMINAL COURT
CITY OF NEW YORK
COUNTY OF QUEENS
125-01 QUEENS BLVD.
KEW GARDENS, NEW YORK

ATTORNEY GENERAL OF THE
STATE OF NEW YORK
STATE OFFICE BUILDING
NEW YORK, NEW YORK

CORPORATION COUNSEL OF THE
CITY OF NEW YORK
1656 MUNICIPAL BUILDING
NEW YORK, NEW YORK

S I R S :

PLEASE TAKE NOTICE, that a verified petition for removal of the above entitled action from the Criminal Court of the City of New York, County of Queens, to the United States District

Court for the Eastern District of New York, a copy of which is annexed hereto, was duly filed this day in the said District Court for the Eastern District of New York at the United States Courthouse at 225 Washington Street, Brooklyn, New York;

Dated: September 2, 1964

YOURS, etc.

HAROLD BRADY, ESQ.
1180 Fulton Street
Brooklyn, N.Y.

EUGENE BROOKS, ESQ.
986 Old County Road
Plainview, Long Island

JOHN M. BURNS III, ESQ.
1 Wall Street
New York, N.Y.

ELI COHN, ESQ.
332 East 149th Street
New York, N.Y.

WILLIAM SCOTT ELLIS, ESQ.
41 East 42nd Street
New York, N.Y.

ARNOLD FEIN, ESQ.
660 Madison Avenue
New York, N.Y.

LEONARD FELDMAN, ESQ.
32 Broadway
New York, N.Y.

MORTY FRIEDMAN, ESQ.
112-10 Farmers Blvd.
St. Albans, Queens

MARVIN KARPATKIN, ESQ.
660 Madison Avenue
New York, N.Y.

JOHN KOSHEL, ESQ.
29 Fairview Lane
Orangeburg, N.Y.

LEONARD H. MARLOW, ESQ.
70 Middle Neck Road
Great Neck, N.Y.

GEORGE SCHIFFER, ESQ.
40 East 49th Street
New York, N.Y.

IRWIN WALDMAN, ESQ.
150 Nassau Street
New York, N.Y.

Of Counsel:

JULES D. ZALON, ESQ.
77 Washington Place
New York, N.Y.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

ERIC EISENBERG, ROBERT HARRIS, RANDY MERIN, EUGENE SHERMAN, STEVEN PETERS, MARTIN RUBIN, ANDY YOUNG, ALBERT ADKINS, BILL BROWN, MARSHALL BROWN, JIMMIE CLARK, KAREN COHEN, PHYLLIS CORBETT, HENRY DOCTOR, PATRICIA DUE, RICHARD GORDON, BERNALL GRIPPER, LANORRES HOBBS, LOREN JENKINS, LANE PERDU, LUCIELLE PLUMMER, FRANK ROBERSON, EDWARD ROBERTS, EUGENE SKLAR, PRICILLA STEPHENS, FREDERICK WEST, FRANKLIN ANDERSON, HOLLY BAUMAN, RONNIE COOK, JIMMIE JONES, WILLIAM JONES, WILLIAM LITTLE, KARL REER, FRANCES TAYLOR, SANDRA TAYLOR, IGAL RODENKO, DONALD ALPER, PAUL DAVIS, JAMES PEAKE, JR., EUGENE TOURNOUR and PAUL JASPER,

Petitioners,

-against-

People of the STATE OF NEW YORK,

CRIMINAL COURT OF THE CITY OF NEW YORK,

and THE CITY OF NEW YORK,

Respondents.

- x

PETITION FOR REMOVAL

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK:

The petition of the above named petitioners by their attorneys, respectfully shows:

1. On April 22, 1964, petitioners were engaged in a lawful, peaceful demonstration at the New York World's Fair. They were arrested with some two hundred others and charged with

Disorderly Conduct (§722 of the Penal Law) and Resisting a Public Officer in the Performance of his Duty (§1851 of the Penal Law). Petitioners were released on bail and are awaiting trial in the Criminal Court of the City of New York.

2. Their Disorderly Conduct consisted solely of picketing, carrying signs, and singing freedom songs, all of which conduct is specifically within the meaning of the doctrine of Edwards v. South Carolina, 83 S. CT. 680 (1963). Their alleged violation of §1851 consisted of refusing to walk to the police vans and busses, but allowing themselves to be carried. Petitioner Young is charged with Felonious Assault because, while being carried by several police officers, and beaten, one of the officers allegedly sustained an injury.

3. Certain other petitioners in the demonstration were charged with Intrusion on Real Property (§ 2036 of the Penal Law). Certain of the petitioners have also been charged with other violations of the Penal Law.

4. The arrests, made by police of the City of New York, and employees of the Pinkerton National Detective Agency, are in violation of the civil rights of the petitioners and petitioners therefore invoke the jurisdiction of this Court pursuant to the provisions of Subdivisions 1 and 2 of Title 28 U.S.C. §1443.

5. These proceedings are pending in Parts II-A, II-B and III of the Criminal Court of the City of New York under Docket Numbers 1140, 41, 48, 49, 50, 55, 60, 72-77, 87, 88, 92, 94, 96, 1153-55, 57, 61, 62, 92, 95, 97-99, 1300-15, 17-22, 24,

25, 27, 30, 31, 33-36, 38, 39, 40, 41, 43, 64; A-1201, 06, A-1907; B-2268, 69, 71, 72, 83, 84, 92, 94, 2322, 23, 91, 2474, 2602, 03, and others not obtainable.

6. Petitioners believe that they can secure neither a fair trial in the Criminal Court of the City of New York, nor rights under the Constitution and Laws of the United States providing for equal protection of the law to citizens of the United States, and are being prosecuted for acts under color of authority derived from the Constitution and Laws of the United States.

7. Petitioners do not contend that all of the judges of the Criminal Court are denying the rights of the petitioners. The conduct of the court as a whole, however, leads inescapably to their conclusion:

a) Bail was imposed on substantially all of those arrested despite the fact that this is quite unusual in such cases.

b) Petitioners have been subjected to numerous harrassing tactics, particularly, but not limited to, being required to appear numerous times for the sole purpose of adjournment. Some of these adjournments have been granted despite strenuous objections by defendants' counsel, and after cases were marked "final." A number of adjournments have been granted ex parte without notice to petitioner.

c) From time to time judges have been specially selected for the purpose of hearing these cases and some of the petitioners have been denied trials on dates and before judges who would normally have heard the cases, solely so

that the case would be heard before the selected judges.

d) Rulings and comments of certain judges have indicated an intent not to follow the United States Supreme Court's rulings in Edwards v. South Carolina, as interpreted by Fields v. South Carolina and City of Rock Hill v. Henry, and a tendancy to prejudge the cases. Some of these judges have refused to allow petitioners' attorneys to properly cross-examine witnesses.

e) Petitioners have been threatened that if they do not plead guilty to Disorderly Conduct, they will, if convicted, be sentenced to jail. In point of fact, charges against many of the demonstrators have been dismissed entirely and many charges have been withdrawn and dismissed.

8. The activities of your petitioners consisted solely in the peaceful exercise of their fundamental rights as American citizens of freedom of speech, freedom of assembly and the right to petition their government for a redress of grievances, all of which rights are inalienably guaranteed to them by the First and Fourteenth Amendments to the Constitution.

9. That no bond with good and sufficient surety is required to be filed herewith and that no filing fee is to be collected in connection herewith since this proceeding is criminal in nature.

WHEREFORE, petitioners pray these cases stand removed.

Dated: September 2, 1964

YOURS, etc.,

HAROLD BRADY, ESQ.
1180 Fulton Street
Brooklyn, N.Y.

EUGENE BROOKS, ESQ.
986 Old County Road
Plainview, Long Island

JOHN M. BURNS III, ESQ.
1 Wall Street
New York, N.Y.

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IRWIN WALDMAN, ESQ.
150 Nassau Street
New York, N.Y.

Of Counsel:

JULES D. ZALON, ESQ.
77 Washington Place
New York, N.Y.

CRIMINAL COURT OF THE CITY OF NEW YORK
PART 2A : COUNTY OF QUEENS

THE PEOPLE OF THE STATE OF NEW YORK On the Complaint of Detective George N. Ackerson -against- BARNAN FANNANIAN and ROBERT LLOYD, Defendants.	Docket Nos. 1197 1199 Charge: Disorderly conduct DECISION

On: September 25, 1969

At: 125-01 Queens Boulevard,
Kew Gardens, New York.

Before:

HONORABLE JOAN O'NEIL,

Judge.

Appearances:

For the People: HARVEY R. HEELIGH, ESQ.,
Assistant District Attorney,
County of Queens.

For the Defendants: RALPH FEUERSTEIN, ESQ.,
15 Park Row,
New York, N. Y.

Bridgeman: ELLIOTT BRANDES,
Court Officer.

ARNOLD S. ROTHBARD, CSR.,
Official Court Reporter.

COURT OFFICER: Docket numbers 1197, 1199, Mahmun Farmanian, Robert Lloyd, charged with disorderly conduct on the complaint of Detective Ackerson.

THE COURT: These cases are on for decision. After having listened to argument and after having read the briefs and done the research suggested by the cases cited in the briefs, I find the defendants not guilty. I don't intend to make a decision, but I would like to say that in reaching my conclusion, bearing in mind the decision of Judge Dubin rendered several months ago, that in my opinion the Fair is public in nature and in addition a doubt was created in my mind in connection with the identification of the individual defendants, keeping in mind the presence of two thousand people and the short distance separating the demonstrators from the spectators, and also bearing in mind the general confusion at that time and place. In my opinion the People acted properly in isolating

persons who might possibly cause any violence to the President, and they were entirely in their rights in that connection; however, I think the right to picket is a very precious one and we must be very very careful and proceed with great caution in any attempt to abridge these rights.

--oo0oo--

The above is a true and correct transcript of the minutes taken in these cause.

Arnold S. Rothland
Official Court Reporter S.F.P.D.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

ERIC EISENBERG, ETAL, :
Petitioners,
:
-against- 64C 886
:
PEOPLE OF THE STATE OF NEW YORK,
Respondents. :

----------x

Whereas the abovenamed Petitioners have been charged under Section 722, 1851 and 2036 of the Penal Law of the State of New York and have removed the prosecution of the said actions to this Court on September 2, 1964 and,

Whereas dispositions have been made to remand certain of the prosecutions to the Criminal Court of the State of New York, County of Queens, and

Whereas the Second Circuit Court of Appeals has rendered an opinion, in the course of which it suggested the title form for removal petitions, and

Whereas the parties hereto deem it advisable to clarify the status of all of the defendant-petitioners herein,

1. The case shall hereafter be known as PEOPLE OF THE STATE OF NEW YORK v. ERIC EISENBERG, ETAL, and

2. The following defendant-petitioners only are presently before this Court in the above entitled action: ERIC EISENBERG, ROBERT HARRIS, RANDY MERIN, EUGENE SHERMAN, STEVEN PETERS, MARTIN RUBIN, BILL BROWN, JIMMIE CLARK,

KAREN COHEN, PHYLLIS CORBETT, BERNALL GRIPPER, LANORRES HOBBS, LOREN JENKINS, LUCIELLE PLUMMER, FRANK ROBERSON, EDWARD ROBERTS, PRICILLA STEPHENS, FREDERICK WEST, FRANKLIN ANDERSON, HOLLY BAUMAN, RONNIE COOK, JIMMIE JONES, WILLIAM JONES, WILLIAM LITTLE, KARL REER, FRANCES TAYLOR, SANDRA TAYLOR, IGAL RODENKO, DONALD ALPER, PAUL DAVIS, JAMES PEAKE, JR., EUGENE TOURNOUR.

Dated: March , 1965
Kew Gardens
Queens County
New York

Frank D. O'Connor, Esq.
District Attorney, Queens County
Attorney for the People

by_____

Louis J. Lefkowitz, Esq.
Attorney General, State of New York
Attorney for Criminal Court

by_____

Jules D. Zalon, Esq.
Attorney for all petitioners

_____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

ERIC EISENBERG, ROBERT HARRIS, RANDY MERIN, EUGENE SHERMAN, STEVEN PETERS, MARTIN RUBIN, ANDY YOUNG, ALBERT ADKINS, BILL BROWN, MARSHALL BROWN, JIMMIE CLARK, KAREN COHEN, PHYLLIS CORBETT, HENRY DOCTOR, PATRICIA DUE, RICHARD GORDON, BERNALL GRIPPER, LANORRES HOBBS, LOREN JENKINS, LANE PERDU, LUCIELLE PLUMMER, FRANK ROBERSON, EDWARD ROBERTS, EUGENE SKLAR, PRICILLA STEPHENS, FREDERICK WEST, FRANKLIN ANDERSON, HOLLY BAUMAN, RONNIE COOK, JIMMIE JONES, WILLIAM JONES, WILLIAM LITTLE, KARL REER, FRANCES TAYLOR, SANDRA TAYLOR, IGAL RODENKO, DONALD ALPER, PAUL DAVIS, JAMES PEAKE, JR., EUGENE TOURNOUR and PAUL JASPER,

Petitioners,

-against-

PEOPLE OF THE STATE OF NEW YORK

CRIMINAL COURT OF THE CITY OF NEW YORK,

and THE CITY OF NEW YORK,

Respondents.

- -X

NOTICE OF MOTION FOR REMAND.

64 C 886

TO ALL OF THE PETITIONERS HEREIN AND TO ALL THE ATTORNEYS OF RECORD FOR SAID PETITIONERS:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE, that on October 14 1964, at the hour of 10 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, the People of the State of New York and the Criminal Court of the City of New York will move the above entitled Court at a Term Motions thereof, at the United States Court House, 225 Washington Street, Brooklyn, New York, for an Order remanding the above

entitled cause from the United States District Court, Eastern District of New York to the Criminal Court of the City of New York, County of Queens, from which Court it was removed.

That at the same time and place, the movants herein will move that costs be taxed in accordance with the law.

Said motion will be made and based upon the Motion herein herewith served upon the attorneys of record of the said Petitioners, a Memorandum of Authorities to be served upon the return day, the Informations and Complaints against each of the Petitioners filed in said Criminal Court of the City of New York in the prosecutions attempted to be removed by Petitioners and upon all papers on file herein.

Dated: Kew Gardens, New York
September 18, 1964.

YOURS, etc.,

FRANK D. O'CONNOR
District Attorney
Queens County

By _____

Attorney for the People
of the State of New York
126-05 Hoover Avenue
Kew Gardens 15, New York

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York

By _____

Attorney for the Criminal
Court of the City of New
York
80 Centre Street
New York 7, N.Y.

TO:

HAROLD BRADY, ESQ.
EUGENE BROOKS, ESQ.
JOHN M. BURRNS III, ESQ.
ELI COHN, ESQ.
WILLIAM SCOTT ELLIS, ESQ.
ARNOLD FEIN, ESQ.
LEONARD FELDMAN, ESQ.
MORTY FRIEDMAN, ESQ.
MARVIN KARPATKIN, ESQ.
JOHN KOSHEL, ESQ.
LEONARD H. MARLOW, ESQ.
GEORGE SCHIFFER, ESQ.
IRWIN WALDMAN, ESQ.
JULES D. ZALON, ESQ., of counsel

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

ERIC EISENBERG, ROBERT HARRIS, RANDY MERIN, EUGENE SHERMAN, STEVEN PETERS, MARTIN RUBIN, ANDY YOUNG, ALBERT ADKINS, BILL BROWN, MARSHALL BROWN, JIMMIE CLARK, KAREN COHEN, PHYLLIS CORBETT, HENRY DOCTOR, PATRICIA DUE, RICHARD GORDON, BERNALL GRIPPER, LANORRES HOBBS, LOREN JENKINS, LANE PERDU, LUCIELLE PLUMMER, FRANK ROBERSON, EDWARD ROBERTS, EUGENE SKLAR, PRICILLA STEPHENS, FREDERICK WEST, FRANKLIN ANDERSON, HOLLY BAUMAN, RONNIE COOK, JIMMIE JONES, WILLIAM JONES, WILLIAM LITTLE, KARL REER, FRANCES TAYLOR, SANDRA TAYLOR, IGAL RODENKO, DONALD ALPER, PAUL DAVIS, JAMES PEAKE, JR., EUGENE TOURNOUR and PAUL JASPER,

MOTION FOR REMAND.

Petitioners,

-against-

PEOPLE OF THE STATE OF NEW YORK,

CRIMINAL COURT OF THE CITY OF NEW YORK,

and THE CITY OF NEW YORK,

Respondents.

- -X

NOW come the People of the State of New York, by their attorney, Frank D. O'Connor, District Attorney of Queens County, and the Criminal Court of the City of New York by its attorney, Louis J. Lefkowitz, Attorney General of the State of New York, and move the Court as follows:

That the above entitled proceeding be remanded to the Criminal Court of the City of New York from which Court criminal proceedings against the petitioners herein as defendants were purportedley removed on or about September 2nd, 1964, by the filing of the petition of the petitioners here-in- above named,

verified by George Schiffer, one of their attorneys. This motion is made upon the ground that the said criminal prosecutions were removed improvidently and without compliance with 28 U.S.C. Section 1443, and that this Court has no jurisdiction thereof, as follows:

1. The Petition attempts to remove more than eighty criminal prosecutions against the petitioners herein, arising out of the alleged violation by them of various provisions of the Penal Law of the State of New York, which criminal prosecutions are pending in the Criminal Court of the City of New York, Queens County. The attempted or purported removal of the said criminal prosecutions to this Court is improper and not in conformance with the pertinent statutes.

2. This Court is without jurisdiction of the said criminal prosecutions because the Petition is insufficient on its face and because the Petition does not comply with the provisions of title 28 U.S.C. Sections 1443 and 1446 thereof.

3. The Petition fails to show the facts whereby, or which cause a denial of, or inability to enforce, in the state Courts of the State of New York, any right secured to the Petitioners or any of them by any law providing for the equal civil rights of citizens of the United States or of persons within the jurisdiction thereof.

4. The Petition fails to show the facts whereby, or which cause a denial of, or inability to enforce, in the Criminal Court of the City of New York or in the Appellate Courts of the State of New York, any of the Petitioners' civil rights by reason of any provision of the Constitution of the State of New York or

of any statute of the State of New York, nor does the Petition show that any hostile State Constitutional provision or Statutes deny, diminish or interfere with the Petitioners' rights of defense in the said pending criminal prosecutions in the Criminal Court of the City of New York.

5. The allegations contained in paragraphs 1, 2, 4, 6, 7 & 8 are conclusory in nature and fail to present the facts.

6. Not only does the Petition fail to set forth facts, rather than broad, indefinite, conjectural, speculative, and all inclusive and specious conclusions, but the verification by one of fourteen attorneys and not by a Petitioner, does not allege the truth of any part thereof, the verification being merely on information and belief.

7. The allegations contained in paragraphs 1, 2, 4, 6, 7 & 8 are denied upon information and belief.

8. The allegations contained in the Petition do not satisfy the prerequisites demanded by 28 U.S.C. Section 1443 and are not sufficient to warrant removal of the said criminal prosecutions pending in the State Court.

9. Assuming arguendo, for the purpose of this removal proceeding only, that the allegations in paragraphs 6 & 7 of the Petition were partially or wholly true, there is no right of removal based on such contentions alone where the State Constitution and Statutes are not discriminatory and apply to all citizens and residents alike and do not deny to Petitioners any rights secured to them by any law providing for the equal civil rights of citizens of the United States or of persons in the jurisdiction thereof.

10. The Petition fails to show that such criminal proceedings, attempted to be removed thereby, concern or are bottomed upon an act or acts done or committed under "color of authority" derived from any law providing for civil rights; which acts are alleged by Petitioners to be under such "color of authority", as set forth in paragraph 6 of the Petition; or the manner or means by which such "color of authority" appears or is

11. The remedy for any alleged denials of, or inability to enforce, equal civil rights which do not primarily result from the State Constitution or laws themselves, lies, in the first instance, in the Appellate State Courts and ultimately, on appropriate proceedings being taken, in the revisory powers of the courts of the United States.

WHEREFORE, the People of the State of New York, by Frank D. O'Connor, District Attorney, Queens County, and the Criminal Court of the City of New York, by Louis J. Lefkowitz, Attorney General of the State of New York, pray that this cause and the criminal proceedings upon which it is based, may be remanded to the Criminal Court of the City of New York, Queens County, to be there proceeded with according to the practice and procedure governing criminal prosecutions in the State of New York.

Dated: Kew Gardens, New York
September 18, 1964.

Yours, etc.,

FRANK D. O'CONNOR
District Attorney
Queens County

By Harvey Eshkol Asst Dist Atty

Attorney for the People
of the State of New York
125-05 Hoover Avenue
Kew Gardens 15, New York

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York

By Mark Frel Asst Atty Gen

Attorney for the Criminal
Court of the City of New York
80 Centre Street
New York 7, New York

HBE:bd:al
10/19/64

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

ERIC EISENBERG, ETAL, :

Petitioners, :

- against - : 64C886

PEOPLE OF THE STATE OF NEW YORK, ETAL, :

Respondents. :

- X

IT IS HEREBY STIPULATED, CONSENTED TO AND AGREED that the date of argument on the Respondents' motion for remand be, and it hereby is adjourned subject to the approval of the Court, to the 28th day of October, 1964.

Dated: October 19, 1964
Kew Gardens,
Queens County,
New York.

Counsel for all Attorneys for Petitioners.

Frank D. O'Connor
Frank D. O'Connor
District Attorney, Queens County
Attorney for the People of the State of New York
Per: Lester D. Jurow A.D.A.

Louis J. Lefkowitz
Louis J. Lefkowitz
Attorney General
State of New York
Attorney for Criminal Court of City of New York
Per: Lester D. Jurow A.D.A.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

ERIC EISENBERG, ETAL,

Petitioners,

-against-

PEOPLE OF THE STATE OF NEW YORK, ETAL,

Respondents.

64C 886

- -x

IT IS HEREBY STIPULATED, CONSENTED TO AND AGREED that the date of argument on the Respondents' motion for remand be, and it hereby is adjourned subject to the approval of the Court, to the 18th day of November, 1964.

Dated: October 27, 1964
Kew Gardens,
Queens County,
New York.

Counsel for all Attorneys for Petitioners.

Frank D. O'Connor
District Attorney, Queens County
Attorney for the People of the State of New York

Louis J. Lefkowitz
Attorney General
Attorney for Criminal Court of City of New York

WF

CRIMINAL COURT OF THE CITY OF NEW YORK
BOROUGH OF QUEENS : SECOND JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-against-

FRANKLIN ANDERSON,

Defendant.

S I R S :

PLEASE TAKE NOTICE that the defendant above named appeals to the Appellate Term of the Supreme Court, Second Department, from the judgment convicting him of the offense of disorderly conduct, rendered in this Court by Honorable MANUEL A. GOMEZ of the Criminal Court of the City of New York, on the 26th day of August, 1964, sentence being a fine of twenty-five ($25.00) dollars, sentence imposed on the 7th day of October, 1964, and from each and every part thereof.

PLEASE TAKE FURTHER NOTICE that the grounds of this appeal are that the said judgment is contrary to law and against the weight of evidence.

Dated: October 27, 1964
Kew Gardens
Queens County
New York

Morton Friedman, Esq.
112-10 Farmers Blvd.
St. Albans, Queens

Carl Rachlin, Esq.
38 Park Row,
New York, N.Y.

George Schiffer, Esq.
40 East, 49th Street,
New York, N.Y.

Jules D. Zalon, Esq.,
7 East, 85th Street
New York, N.Y.

filed oct. 27, 1964

United States District Court
Eastern District of New York

- x

Eric Eisenberg, Etal, :

Petitioners, :

-against- :

The People of the State of New York, Etal, : 64C 886

:

Respondents. :

- x

IT IS HEREBY STIPULATED, CONSENTED TO AND AGREED that the date of argument on the Respondents' motion for remand be, and it hereby is adjourned subject to the approval of the Court, to the 13th day of January, 1965.

Dated: November 12, 1964
Kew Gardens,
Queens County,
New York.

Counsel for all Attorneys for Petitioners.

Frank D. O'Connor
District Attorney,
Queens County,
Attorney for the People of the State of New York

Per [signature]

Louis J. Lefkowitz,
Attorney General
Attorney for Criminal Court of the City of New York

Per [signature]

GEORGE SCHIFFER

December 18, 1964

Edward N. Herman
Assistant District Attorney
Queens Criminal Court
126-05 Hoover Avenue
Kew Gardens 15, N.Y.

Dear Eddie,

Consonant with our telephone conversation today, and the conference memorandum of November 12, I am herein enclosing a tentative trial schedule for the cases presently in the Federal Court. You will note that this involves only 36 of the original 41 cases removed. Eugene Brooks has determined to remain in the Federal Court on the trial by jury question and I understand that a separate motion of remand is to be argued January 20; Jasper has pleaded to § 722 and the other charges have been dismissed and withdrawn, and Young never was removed, as he was in the Supreme Court at the time of removal.

January	27:	West
February	2:	Cook
	9:	Perdu and Little
	16:	Bauman and Anderson(1851 only)
	23:	Reer, Taylor and Taylor
March	2:	Gripper, Hobbes and Jenkins
	9:	Plummer, Clark, Cohen and Corbett
	16:	Adkins, Brown and Brown
	23:	Rodenko, Rubin and Peters
	229:	Roberson, Roberts and Sklar(1851 only)
April	5:	Jones and Jones
	22:	Eisenberg, Harris, Merin and Sherman
	27:	Alper, Davis, Peake and Tournour
May	3:	Stevens

Inasmuch as the Court of Appeals has not heard any of the pertinent cases now on appeal, I imagine that the decision on whether to try these cases will be further abated, but we can discuss that matter later in the month.

Wishing you a happy, if litigious, holiday season,

Jules

ADDENDUM: LIST OF ATTORNEY'S CLIENTS

HAROLD BRADY, ESQ., attorney for petitioner West;

EUGENE BROOKS, ESQ., attorney for petitioners Doctor, Due and Gordon;

JOHN M. BURNS III, ESQ., attorney for petitioners Roberson, Roberts, Sklar and Stephens;

ELI COHN, ESQ., attorney for petitioners Adkins, Bill Brown and Marshall Brown;

WILLIAM SCOTT ELLIS, ESQ., attorney for petitioners Plummer, Clark, Cohen and Corbett;

ARNOLD FEIN, ESQ., attorney for petitioners Rodenko, Rubin and Peters;

LEONARD FELDMAN, ESQ., attorney for petitioners Jimmie Jones and William Jones;

MORTY FRIEDMAN, ESQ., attorney for petitioners Anderson, and Bauman;

MARVIN KARPATKIN, ESQ., attorney for petitioner Cook;

JOHN KOSHEL, ESQ., attorney for petitioners Gripper, Hobbs and Jenkins;

LEONARD MARLOW, ESQ., attorney for petitioners Reer, Frances Taylor and Sandra Taylor;

GEORGE SCHIFFER, ESQ., attorney for petitioners Young, Eisenberg, Harris, Merin, Sherman, Alper, Davis, Peake, Tournour and Jasper;

IRWIN WALDMAN, ESQ., attorney for petitioners Perdu and Little

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS

- x

PEOPLE OF THE STATE OF NEW YORK,

v.

ERIC EISENBERG, ROBERT HARRIS, RANDY MERIN, EUGENE SHERMAN, STEVEN PETERS, MARTIN RUBIN, ANDY YOUNG, ALBERT ADKINS, BILL BROWN, MARSHALL BROWN, JIMMIE CLARK, KAREN COHEN, PHYLLIS CORBETT, HENRY DOCTOR, PATRICIA DUE, RICHARD GORDON, BERNALL GRIPPER, LANORRES HOBBS, LOREN JENKINS, LANE PERDU, LUCIELLE PLUMMER, FRANK ROBERSON, EDWARD ROBERTS, EUGENE SKLAR, PRICILLA STEPHENS, FREDERICK WEST, FRANKLIN ANDERSON, HOLLY BAUMAN, RONNIE COOK, JIMMIE JONES, WILLIAM JONES, WILLIAM LITTLE, KARL REER, FRANCES TAYLOR, SANDRA TAYLOR, IGAL RODENKO, DONALD ALPER, PAUL DAVIS, JAMES PEAKE, JR., EUGENE TOURNOUR and PAUL JASPER,

Defendants.

- x

TO: THE CLERK OF THE CRIMINAL COURT
CITY OF NEW YORK
COUNTY OF QUEENS
125-01 QUEENS BLVD.
KEW GARDENS, NEW YORK

ATTORNEY GENERAL OF THE
STATE OF NEW YORK
STATE OFFICE BUILDING
NEW YORK, NEW YORK

CORPORATION COUNSEL OF THE
CITY OF NEW YORK
1656 MUNICIPAL BUILDING
NEW YORK, NEW YORK

S I R S :

PLEASE TAKE NOTICE, that a verified petition for removal of the above entitled action from the Criminal Court of the City of New York, County of Queens, to the United States District

Court for the Eastern District of New York, a copy of which is annexed hereto, was duly filed this day in the said District Court for the Eastern District of New York at the United States Courthouse at 225 Washington Street, Brooklyn, New York;

Dated: September 2, 1964

YOURS, etc.

HAROLD BRADY, ESQ.
1180 Fulton Street
Brooklyn, N.Y.

EUGENE BROOKS, ESQ.
986 Old County Road
Plainview, Long Island

JOHN M. BURNS III, ESQ.
1 Wall Street
New York, N.Y.

ELI COHN, ESQ.
332 East 149th Street
New York, N.Y.

WILLIAM SCOTT ELLIS, ESQ.
41 East 42nd Street
New York, N.Y.

ARNOLD FEIN, ESQ.
660 Madison Avenue
New York, N.Y.

LEONARD FELDMAN, ESQ.
32 Broadway
New York, N.Y.

MORTY FRIEDMAN, ESQ.
112-10 Farmers Blvd.
St. Albans, Queens

MARVIN KARPATKIN, ESQ.
660 Madison Avenue
New York, N.Y.

JOHN KOSHEL, ESQ.
29 Fairview Lane
Orangeburg, N.Y.

LEONARD H. MARLOW, ESQ.
70 Middle Neck Road
Great Neck, N.Y.

GEORGE SCHIFFER, ESQ.
40 East 49th Street
New York, N.Y.

IRWIN WALDMAN, ESQ.
150 Nassau Street
New York, N.Y.

Of Counsel:

JULES D. ZALON, ESQ.
77 Washington Place
New York, N.Y.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

ERIC EISENBERG, ROBERT HARRIS, RANDY MERIN, EUGENE SHERMAN, STEVEN PETERS, MARTIN RUBIN, ANDY YOUNG, ALBERT ADKINS, BILL BROWN, MARSHALL BROWN, JIMMIE CLARK, KAREN COHEN, PHYLLIS CORBETT, HENRY DOCTOR, PATRICIA DUE, RICHARD GORDON, BERNALL GRIPPER, LANORRES HOBBS, LOREN JENKINS, LANE PERDU, LUCIELLE PLUMMER, FRANK ROBERSON, EDWARD ROBERTS, EUGENE SKLAR, PRICILLA STEPHENS, FREDERICK WEST, FRANKLIN ANDERSON, HOLLY BAUMAN, RONNIE COOK, JIMMIE JONES, WILLIAM JONES, WILLIAM LITTLE, KARL REER, FRANCES TAYLOR, SANDRA TAYLOR, IGAL RODENKO, DONALD ALPER, PAUL DAVIS, JAMES PEAKE, JR., EUGENE TOURNOUR and PAUL JASPER,

Petitioners,

-against-

People of the STATE OF NEW YORK,

CRIMINAL COURT OF THE CITY OF NEW YORK,

and THE CITY OF NEW YORK,

Respondents.

- x

PETITION FOR REMOVAL

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK:

The petition of the above named petitioners by their attorneys, respectfully shows:

1. On April 22, 1964, petitioners were engaged in a lawful, peaceful demonstration at the New York World's Fair. They were arrested with some two hundred others and charged with

Disorderly Conduct (§722 of the Penal Law) and Resisting a Public Officer in the Performance of his Duty (§1851 of the Penal Law). Petitioners were released on bail and are awaiting trial in the Criminal Court of the City of New York, County of Queens.

2. Their Disorderly Conduct consisted solely of picketing, carrying signs, and singing freedom songs, all of which conduct is specifically within the meaning of the doctrine of Edwards v. South Carolina, 83 S. CT. 680 (1963). Their alleged violation of §1851 consisted of refusing to walk to the police vans and busses, but allowing themselves to be carried. Petitioner Young is charged with Felonious Assault because, while being carried by several police officers, and beaten, one of the officers allegedly sustained an injury.

3. Certain other petitioners in the demonstration were charged with Intrusion on Real Property (§ 2036 of the Penal Law). Certain of the petitioners have also been charged with other violations of the Penal Law.

4. The arrests, made by police of the City of New York, and employees of the Pinkerton National Detective Agency, are in violation of the civil rights of the petitioners and petitioners therefore invoke the jurisdiction of this Court pursuant to the provisions of Subdivisions 1 and 2 of Title 28 U.S.C. §1443.

5. These proceedings are pending in Parts II-A, II-B and III of the Criminal Court of the City of New York under Docket Numbers 1140, 41, 48, 49, 50, 55, 60, 72-77, 87, 88, 92, 94, 96, 1253-55, 57, 61, 62, 92, 95, 97-99, 1300-15, 17-22, 24,

25, 27, 30, 31, 33-36, 38, 39, 40, 41, 43, 64; A-1201, 06, A-1907; B-2268, 69, 71, 72, 83, 84, 92, 94, 2322, 23, 91, 2474, 2602, 03, and others not obtainable.

6. Petitioners believe that they can secure neither a fair trial in the Criminal Court of the City of New York, nor rights under the Constitution and Laws of the United States providing for equal protection of the law to citizens of the United States, and are being prosecuted for acts under color of authority derived from the Constitution and Laws of the United States.

7. Petitioners do not contend that all of the judges of the Criminal Court are denying the rights of the petitioners. The conduct of the court as a whole, however, leads inescapably to their conclusion:

a) Bail was imposed on substantially all of those arrested despite the fact that this is quite unusual in such cases.

b) Petitioners have been subjected to numerous harrassing tactics, particularly, but not limited to, being required to appear numerous times for the sole purpose of adjournment. Some of these adjournments have been granted despite strenuous objections by defendants' counsel, and after cases were marked "final." A number of adjournments have been granted ex parte without notice to petitioner.

c) From time to time judges have been specially selected for the purpose of hearing these cases and some of the petitioners have been denied trials on dates and before judges who would normally have heard the cases, solely so

that the case would be heard before the selected judges.

d) Rulings and comments of certain judges have indicated an intent not to follow the United States Supreme Court's rulings in Edwards v. South Carolina, as interpreted by Fields v. South Carolina and City of Rock Hill v. Henry, and a tendancy to prejudge the cases. Some of these judges have refused to allow petitioners' attorneys to properly cross-examine witnesses.

e) Petitioners have been threatened that if they do not plead guilty to Disorderly Conduct, they will, if convicted, be sentenced to jail. In point of fact, charges against many of the demonstrators have been dismissed entirely and many charges have been withdrawn and dismissed.

8. The activities of your petitioners consisted solely in the peaceful exercise of their fundamental rights as American citizens of freedom of speech, freedom of assembly and the right to petition their government for a redress of grievances, all of which rights are inalienably guaranteed to them by the First and Fourteenth Amendments to the Constitution.

9. That no bond with good and sufficient surety is required to be filed herewith and that no filing fee is to be collected in connection herewith since this proceeding is criminal in nature.

WHEREFORE, petitioners pray these cases stand removed.

Dated: September 2, 1964

YOURS, etc.,

HAROLD BRADY, ESQ.
1180 Fulton Street
Brooklyn, N.Y.

EUGENE BROOKS, ESQ.
986 Old County Road
Plainview, Long Island

JOHN M. BURNS III, ESQ.
1 Wall Street
New York, N.Y.

ELI COHN, ESQ.
332 East 149th Street
New York, N.Y.

WILLIAM SCOTT ELLIS, ESQ.
41 East 42nd Street
New York, N.Y.

ARNOLD FEIN, ESQ.
660 Madison Avenue
New York, N.Y.

LEONARD FELDMAN, ESQ.
32 Broadway
New York, N.Y.

MORTY FRIEDMAN, ESQ.
112-10 Farmers Blvd.
St. Albans, Queens

MARVIN KARPATKIN, ESQ.
660 Madison Avenue
New York, N.Y.

JOHN KOSHEL, ESQ.
29 Fairview Lane
Orangeburg, N.Y.

LEONARD H. MARLOW, ESQ.
70 Middle Neck Road
Great Neck, N.Y.

GEORGE SCHIFFER, ESQ.
40 East 49th Street
New York, N.Y.

IRWIN WALDMAN, ESQ.
150 Nassau Street
New York, N.Y.

Of Counsel:

JULES D. ZALON, ESQ.
77 Washington Place
New York, N.Y.

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

GEORGE SCHIFFER, being duly sworn, deposes and says:

That he is one of the attorneys for the petitioners herein and that he has read the foregoing petition and knows the contents thereof; that he makes this petition on information and belief; and that he believes it to be true.

_____
GEORGE SCHIFFER

Sworn to before me this
2nd day of September, 1964

_____
Notary Public

H. B. Ehrlich

April 1, 1965

Eli Cohen, Esq.
332 East 149th Street
Bronx, New York

Dear Sir:

Enclosed herewith please find copy of my statement to the Criminal Court for the purpose of restoring the prosecutions against Adkins, Brown and Perdu to the calendar.

Very truly yours,

FRANK D. O'CONNOR
District Attorney

By _____
Harvey B. Ehrlich
Assistant District Attorney

HBE:ejh
Encl.

CC: George Schiffer, Esq.

Kew Gardens, New York

Harvey B. Ehrlich

before me this

19

Sworn to before me this

M 9555

Criminal Court of the City of New York
County of Queens

- -X

The People of the State of New York :

-against- :

Albert Adkins, Marshall Brown and Lane Perdu, :

Defendants.

- -X

State of New York)
) SS.:
County of Queens)

I, Harvey B. Ehrlich, being an attorney at law admitted to practice in the courts of this state and an assistant district attorney of Queens County, of counsel to Frank D. O'Connor, District Attorney of Queens County, attorney of record for the People of the State of New York, do hereby affirm the statements herein to be true under the penalties of perjury, except such as are made upon information and belief, which latter I believe to be true.

1. The above named defendants, together with others, petitioned the United States District Court, Eastern District of New York, to effect the removal of the criminal prosecutions pending in this court to the Federal court.

2. On the 17th day of March, 1965, the criminal prosecutions against the above named defendants were remanded to the Criminal Court of the City of New York.

3. This case should be restored to the calendar in this court and set down for trial.

Dated: April 1, 1965
Kew Gardens, New York

Harvey B. Ehrlich

Sworn to before me this _____
day of _____ 19

SUBPOENA

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.

TO: STEPHEN KENNEDY, NEW YORK WORLD'S FAIR CORPORATION,
FLUSHING, QUEENS, NEW YORK

You are hereby commanded to appear before the Criminal Court, County of Queens, Part IIB at the courthouse, 125-01 Queens Boulevard, Kew Gardens, Queens, New York, on the 11th day of May, 1965 at 10 A.M. as a witness in a criminal action prosecuted by the PEOPLE OF THE STATE OF NEW YORK against Albert Adkins, Marshall Brown and Lane Perdu.

Dated at the City of New York, County of New York, the 6th day of May, 1965.

Eli Cohn

ELI COHN
Attorney for Defendants
Office and P. O. Address
52 Vanderbilt Avenue
New York, New York

CHILE BOND
GOLDSMITH BROS. N.Y.
100% CONTENT

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

STEVEN PETERS, MARTIN RUBIN, FREDERICK WEST, FRANKLIN ANDERSON, HOLLY BAUMAN, RONNIE COOK, JIMMIE JONES, WILLIAM JONES, WILLIAM LITTLE, KARL REER, FRANCES TAYLOR, SANDRA TAYLOR, IGAL RODENKO, DONALD ALPER, PAUL DAVIS, JAMES PEAKE, JR.

Petitioners,

64C ~~886~~ 886 ~~917~~

-against-

PEOPLE OF THE STATE OF NEW YORK, ET AL,

Respondents.

----------x

IT IS HEREBY STIPULATED, CONSENTED TO AND AGREED that the cases involving the above named Petitioners now pending in the United States District Court for the Eastern District of New York be and the same hereby are remanded to the Criminal Court of the City of New York, County of Queens, subject to the approval of the Court.

Dated: November 8, 1965
Kew Gardens
Queens County,
New York

Stephen M. Nagler

Stephen M. Nagler
Counsel for all Attorneys
For Petitioners.

Frank D. O'Connor
per Harvey Eichel

Frank D. O'Connor
District Attorney, Queens County
Attorney for the People
of the State of New York

Louis J. Lefkowitz
Attorney General
Attorney for Criminal
Court of the City of
New York

per Harvey Eichel

At a Special Term Ex Parte
of the United States District
Court held in and for the
Eastern District of New York,
at the Courthouse,

on the day of , 1965

PRESENT:

HON.

DISTRICT JUDGE

----------X

STEVEN PETERS, MARTIN RUBIN, FREDERICK WEST,
FRANKLIN ANDERSON, HOLLY BAUMAN, RONNIE COOK,
JIMMIE JONES, WILLIAM JONES, WILLIAM LITTLE,
KARL REER, FRANCES TAYLOR, SANDRA TAYLOR,
IGAL RODENKO, DONALD ALPER, PAUL DAVIS,
JAMES PEAKE, JR.

Petitioners,

64C 886

-against-

ORDER

PEOPLE OF THE STATE OF NEW YORK

Respondent.

----------X

The above named petitioners, having been charged under §§ 722 and 1851 of the Penal Law of the State of New York, and having removed the prosecution of the said action to this Court on September 2, 1964, along with 25 other petitioners similarly charged under the said Penal Law, and having by Counsel entered into a stipulation with the District Attorney of Queens County and the Attorney General of the State of New York, in which all parties thereto consent, remanding the prosecution of the said petitioner case to the Criminal Court of the City of New York, County of Queens,

NOW, upon reading and filing the Stipulation dated the day of , 1965, and upon the proceedings held heretofore in the Criminal Court of the City of New York; the

MOTION is granted and it is

ORDERED that, as regards the petitioners, STEVEN PETERS, MARTIN RUBIN, FREDERICK WEST, FRANKLIN ANDERSON, HOLLY BAUMAN, RONNIE COOK, JIMMIE JONES, WILLIAM JONES, WILLIAM LITTLE, KARL REER, FRANCES TAYLOR, SANDRA TAYLOR, IGAL RODENKO, DONALD ALPER, PAUL DAVIS, JAMES PEAKE, JR., this case is

REMANDED to the Criminal Court of the City of New York, County of Queens, for all purposes, without prejudice to the cases of the remaining petitioners similarly situated,

SO ORDERED:

U.S.D.J.

At a Special Term Ex Parte
of the United States District
Court held in and for the
Eastern District of New York, at
the Courthouse,

on the day of , 1965

PRESENT:

HON.

DISTRICT JUDGE

- X

ERIC EISENBERG, ROBERT HARRIS, RANDY MERIN, EUGENE SHERMAN, EUGENE TOURNOUR, BILL BROWN, JIMMIE CLARK, KAREN COHEN, PHYLLIS CORBETT, VERNAL GRIPPER, LAURRAS HOBBS, LOREN JENKINS, FRANK ROBERSON, LUCILLE PLUMMER, EDWARD ROBERTS, and PRISCILLA STEVENS,

Petitioners, 64C 886

-against- **ORDER**

PEOPLE OF THE STATE OF NEW YORK

Respondent.

- X

The above named petitioners, having been charged under SS 722 and 1851 of the Penal Law of the State of New York, and having removed the prosecution of the said action to this Court on September 2, 1964, along with 25 other petitioners similarly charged under the said Penal Law, and having by Counsel entered into a stipulation with the District Attorny of Queens County and the Attorney General of the State of New York, in which all parties thereto consent, remanding the prosecution of the said petitioner* case to the Criminal Court of the City of New York, County of Queens, without prejudice to any of the other petitioners similarly situated,

NOW, upon reading and filing the Stipulation dated the 28TH day of MAY, 1965, and upon the proceedings held heretofore in the Criminal Court of the City of New York; the

MOTION is granted and it is,

ORDERED that, as regards the petitioners, ERIC EISENBERG, ROBERT HARRIS, RANDY MERIN, EUGENE SHERMAN, EUGENE TOURNOUR, BILL BROWN, JIMMIE CLARK, KAREN COHEN, PHYLLIS CORBETT, VERNAL GRIPPER, LAURRAS HOBBS, LOREN JENKINS, FRANK ROBERSON, LUCILLE PLUMMER, EDWARD ROBERTS, and PRISCILLA STEVENS, this case is

REMANDED to the Criminal Court of the City of New York, County of Queens, for all purposes, without prejudice to the cases of the remaining petitioners similarly situated,

SO ORDERED:

U. S. D. J.

CHARLE BOND
GOLDSMITH PAPER CO. N.Y.
RAG CONTENT

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS PART IIB

----------X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

Docket Nos.

ALBERT ADKINS, MARSHALL BROWN, AND
LANE PERDU

Defendants

----------X

DEFENDANTS' PRE-TRIAL MEMORANDUM OF LAW

SUMMARY OF POINTS PRESENTED

As to the Charges of Violation of § 722.

POINT I - SECTION 722(2) and(4) DO NOT APPLY UNLESS A BREACH OF THE PEACE, i.e., VIOLENCE OR THE THREAT OF VIOLENCE OCCURS, A MERE INCONVENIENCING IS NOT ENOUGH.

POINT II -PEACEFUL, NON-VIOLENT PICKETING TO EXPRESS VIEWS IS CONSTITUTIONALLY PROTECTED "FREE SPEECH"

POINT III-BECAUSE § 722 IS A PENAL STATUTE A WRONGFUL INTENT IS A NECESSARY ELEMENT OF THE OFFENSE.

POINT IV -A STATUTE WHICH VESTS DISCRETION IN POLICE OR OTHER ADMINISTRATIVE AUTHORITIES IS UNCONSTITUTIONALLY VAGUE AND VIOLATES DUE PROCESS.

POINT V - THE WORLD'S FAIR PINKERTON GUARDS HAVE NO AUTHORITY TO ARREST FOR A MERE VIOLATION.

POINT VI -SECTION 1851 DOES NOT APPLY TO NON-VIOLENT, NON-COOPERATION WITH A PERSON'S OWN ARREST.

POINT VII-EVEN IF § 1851 IS APPLICABLE NON-VIOLENT, NON-COOPERATION IS NOT RESISTANCE.

POINT VIII IF THE OTHER CHARGES FAIL, THE § 1851 CHARGE MUST, AS A MATTER OF LAW, BE DISMISSED.

As to Charges of Violation of § 2036:

POINT IX - SECTION 2036 OF THE PENAL LAW APPLYING TO UNLAWFUL INTRUSION DOES NOT APPLY TO PERSONS WHO ENTERED LAWFULLY,

POINT X PERSONS WHO ENTER AND REMAIN ON THE GROUNDS OF THE WORLD'S FAIR UNDER A COLORABLE CLAIM OF RIGHT LACK THE CRIMINAL INTENT NECESSARY UNDER § 2036.

As To Charges of Violation of § 722:

POINT I

SECTION 722(2) and (4) DO NOT APPLY UNLESS A BREACH OF THE PEACE I.E., VIOLENCE OR THE THREAT OF VIOLENCE OCCURS. A MERE INCONVENIENCING IS NOT ENOUGH.

The Court of Appeals of the State of New York has consistently held that in order for an act to be punishable under either subdivision 2 or subdivision 4 of Section 722 a "breach of the peace" must have occurred. PEOPLE v. CARCEL, 3 N.Y. 2d 327 (1957); PEOPLE v. NIXON, 248 N.Y. 182 (1928); PEOPLE v. MOST, 171 N.Y. 423; PEOPLE v. HARVEY, 307 N.Y. 588 (1954)

In PEOPLE v. CARCEL, supra, the court said, as to what would constitute a breach of the peace:

> "The common law, definition of 'breach of peace', though not controlling, is helpful in ascertaining the nature of the acts proscribed by the statute. In PEOPLE v. MOST, 171 N.Y. 423, 429 breach of peace was defined as a 'distirbance of public order by any act of violence or by any act likely to produce violence, or which by causing consternation and alarm disturbs the peace and quiet of the community'...CANTWELL v. CONNECTICUT, 310 v.s. 296, 308....guided by this definition the courts have indicated that something more than a mere inconveniencing of pedestrians is required to support a conviction under subdivision 2."

PEOPLE v. NIXON, supra, involved one hundred and twenty convictions arising from labor demonstrations. People were parading 4 abreast on a 12 foot wide sidewalk, occupying one-half of it. The regular amount of traffic could barely get through and some pedestrians had to walk in the gutter. The court dismissed the § 722(2) charge saying:

> "...As yet, bad manners have not been made punishable by imprisonment...(T)here is nothing to show that any other person could have regarded the defendants' conduct as a threat or as calculated to coerce or impede anyone. In the absence of evidence, we may not infer that the conduct of the defendants was intended as a threat or could be construed, or was an incentive to violence by others."

In PEOPLE v. NIXON, supra, and PEOPLE v. CARCEL the Court of Appeals carefully pointed out that:

> "Men and women constantly congregate or walk upon the streets in groups, quite oblivious to the fact that to some degree they are thereby causing inconvenience to others using the street."

Thus, although such persons certainly fall within the terms of § 722 (2), if read literally, such a reading would be incorrect. Only if a "breach of the peace" has been occasioned.. that is, "violence", or the "threat of violence" or "alarm" are the acts punishable under § 722.

Furthermore, it has frequently been held that for there to be a conviction under § 722(4) there must have been:

> "...At least a breach of peace which caused a number of persons to congregate." PEOPLE v. KIERAN, 26 NYS. 2d 291(1941); PEOPLE v. LaSISTER, 9 Misc 2d. 518 (1948).

What constitutes a "crowd" under the terms of § 722(4) has consistently been regarded as varying with the circumstances:

> "At best the word is indefinite. Difference in time and place may shape its meaning. A crowd at midnight might not be a crowd at noon. A crowd in a country schoolhouse might not be a crowd in Washington Square, but there is always implied in the word numbers with reference to the hour and location. " PEOPLE v. PHILLIPS, 245, N.Y. 401 (1927)

What would constitute a "crowd" suffieient to violate the statute in the circumstances of a case arising at the New York

World's Fair grounds in the middle of the day is obviously far more than under many other circumstances. In PEOPLE v. KIERAN, supra, a crowd on a public street which grew from 50 to 125 during the course of the arrest was held to be insufficient. The court said that a "multitude" or a "great number of persons" was required.

As the statute is written, the collection of a "crowd" is considered by the legislature to be one way in which a breach of peace might be occasioned. The obvious implication is that the crowd might become unruly and disturb the public order. That newsmen and reporters who act only as observers should not be counted is obvious. Even more apparently, peace officers should not be counted in determining the existence of a crowd. In fact, if sufficient police are present, the possibility of a breach of peace becomes considerably less and the applicability of § 722(4) becomes even more unlikely. EDWARDS v. SOUTH CAROLINA, 372 U.S. 229 (1963); FIELDS v. SOUTH CAROLINA, 375 U.S. 44(1964); COX v. LOUISIANA, 85S Ct. 453(1965).

Furthermore, there is an exception within the terms of § 722(4) for persons "lawfully addressing such a crowd". "Pure Speech" is certainly not the only means of addressing people. It has been throughly established that picketing, marching, and patrolling are also means of expression. CANTWELL v. CONNECTICUT, supra; GARNER v. LOUISIANA, 368 U.S. 157; SCHNEIDER v. IRVINGTON, 308 U.S. 147, EDWARDS v. SOUTH CAROLINA, supra. They should therefore be regarded as outside the scope of the statute.

POINT II

PEACEFUL, NON-VIOLENT PICKETING TO EXPRESS VIEWS IS CONSTITUTIONALLY PROTECTED "FREE SPEECH."

As was just stated in POINT I "Free Speech" as well as "Free Assembly" and the right to petition for a redress of grievances, encompass far more than "Pure Speech". Picketing and similar forms of conduct when used for the valid purpose of expressing grievances, are also "Protected Speech." EDWARDS v. SOUTH CAROLINA, supra. Though the views expressed by the demonstrators may be unpopular as in the EDWARDS case, though they stir people to anger as in the CANTWELL case, they are protected by the First Amendment, to the U. S. Constitution as well as Article 1 § 8 of the Constitution of the State of New York.

This is not to say that fighting words are protected FEINER v. NEW YORK, 340 U.S. 315. But peaceful, non-violent demonstrations provide no threat to the community against which a state may act. EDWARDS v. SOUTH CAROLINA, supra, FIELDS v. SOUTH CAROLINA, supra; COX v. LOUISIANA, supra. It is clear from these cases that though the state may make reasonable traffic regulations, (COX v. NEW HAMPSHIRE, 312 U.S. 569) it could not under a general statute, which in its terms could

include even the most harmless conduct, prevent incidental obstructions arising from the "peaceful expression of unpopular views". In COX v. LOUISIANA, supra, the Supreme Court noted specifically that the sidewalk was obstructed, but said that the conduct of defendants nonetheless, fell within the doctrine of the EDWARDS case that such forms of expression are:

> "...protected against censorshop or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience annoyance or unrest."

In addition, the courts on numerous occasions have held that property having certain public attributes is subject to the First and Fourteenth Amendments, notwithstadning its private form of ownership. MARSH v. ALABAMA , 326 U.S. 501 (1946); WATCHTOWER BIBLE & TRACT SOCIETY v. METROPOLITAN LIFE INSURANCE CO., 297, N.Y. 339 (1948). In MARSH v. ALABAMA, the court said:

> "Ownership does not always mean absolute dominion. The more an owner, for his general advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

That these words are applicable to the grounds of the New York World's Fair was made clear in FARMER v. MOSES, 64 Civ. 1666(1964) in which Judge Tyler said"

> "Upon analysis of the foregoing facts, I find that the Fair Corporation and its operations are so impregnated with and supported by State and City action as to place them within the ambit of the Fourteenth Amendment. This is so even though it may be reasonably inferred that the Fair Corporation does possess certain indicia and aspects of 'private' ownership and dominion."

POINT III

BECAUSE § 722 IS A PENAL STATUTE A WRONGFUL INTENT IS A NECESSARY ELEMENT OF THE OFFENSE.

Picketing resting solely on malice or ill will may be unlawful, but that is not so where it is sought to attain some:

> "...purpose in the eye of the law thought sufficient to justify the harm that may be done to others". ANORA AMUSEMENT CORP.v. DOE, 12 N.Y.S 2d 400 (1939). EXCHANGE BAKERY & RESTAURANT, INC. v. RIFKIN, 245 N.Y. at 263.

Thus if the purpose of the demonstrators is merely the "peaceful expression of unpopular views" they lack the Mens Rea required under the statute. In overturning a conviction based on a Louisiana statute, The Supreme Court in COX v. LOUISIANA, supra, said:

> "In upholding appellant's conviction under the statute, the Louisiana Supreme Court thus construed the statute so as to apply to public assemblies which do not have as their specific purpose the obstruction of traffic."

In other words, persons who intend to express their views and not to obstruct, or otherwise foment a breach of the peace lack the wrongful intent required by the statute.

POINT IV

A STATUTE WHICH VESTS DISCRETION IN POLICE OR OTHER ADMINISTRATIVE AUTHORITIES IS UNCONSTITUTIONALLY VAGUE AND VIOLATES DUE PROCESS.

In COX v. LOUISIANA, supra, nearly 2000 people participated in a Civil Rights demonstration and a hostile crowd gathered. The Louisiana statute against "obstructing passages" under which Cox was prosecuted was similar to § 722(2). The court found that the demonstrators violated the statute as construed by the Louisiana Supreme Court, and that any street parade or demonstration would so violate the statute, but the record indicated that certain parades or demonstrations had been permitted by local authorities, and so, the court said:

> "The situation is the same as if the statute itself expressly provided that there should only be peaceful parades or demonstrations in the unbridled discretion of the local officials. The pervasive restraint on freedom of discussion by the practice of the authorities under the statute is not any less effective than a statute expressly permitting such selective enforcement. A long line of cases in this court make it clear that a statute or municipality cannot 'require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while other ideas may not be....disseminated....

> It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute."

Thus, although the legislature may have a right to limit parades or demonstrations, in the interests of traffic regulation it may not delegate this power to the arbitrary exercise of administrative personnel, much less to private citizens...

POINT V

THE WORLD'S FAIR PINKERTON GUARDS HAVE NO AUTHORITY TO ARREST FOR A MERE VIOLATION.

In the 16th century in the case of DARCY v. ALLIN, Noy 173, 74 English Reports 1131, the principle was established that:

> "The law knoweth no commandment but by writ, nor no minister to execute the commandments of the law, but the sheriff and the officers under him, for he is the only lieutenant in the time of peace, who is to be guided by the law, and to be controlled, if he follow not the course of the law in the commandments of the King or of the law."

The principle of "popular sovereignty" - Responsibility of government officials to the people at large - was firmly established in our state and federal constitutions. Government power, under our system, must rest with persons who may be held accountable for its use. For this reason the courts have constantly stricken statutes which tend to place public power in private hands, as a violation of "due process", "equal protection" and the constitutional provision that the power to pass laws is vested in the legislature (N.Y. Constitution, Art. 3 § 1).

In FOX v. MOHAWK & HUDSON RIVER HUMANE SOCIETY, 165 N.Y. 517, the Court of Appeals rejected a statute empowering the Humane Society animal license fees. In speaking for the court, Cullen, J. said:

> "...I certainly should deny the right of the legislature to vest in private associations or corporations authority and power affecting the life, liberty and property of the citizens, except that of eminent domain, to be exercised
> q for a public purpose and the management and control of reformatory institutions to which persons may be committed by the judicial or other public authorities...My chief objection is that the corporations are private in the sense that they proceed from the voluntary action of individual citizens alone (in many cases it is not necessary that the members of the corporation should be citizens), that the agents or officers of the corporation are appointed such by the corporators and that if such agents are invested by virtue of their agency alone with the power of public officers, it is in substance devolving the choice of public offices on a few of the citizens and possibly persons not citizens, while under the constitution, all public officers must be elected or appointed by other public authorities and thus trace their title to power and authority either immediately or mediately back to the People."(Emphasis Supplied).

Even if the World's Fair Corporation is considered a subordinate governmental agency, the delegation of the power

to enforce the laws of the state is nonetheless invalid:

> "....the administration of government generally can (not) be confined to 'subordinate governmental agencies' in the shape of corporations and associations" FOX v. MOHAWK & HUDSON RIVER HUMANE SOCIETY, supra.

In FINK v. COLE, 302 N.Y. 316, the Court of Appeals voided a statute which attempted to delegate the regulation of the sport of Horse Racing to the Jockey Club. The court said:

> "The stewards of the club exercising sovereign power are neither chosen by, nor responsible to the State government. They are not sworn officers, nor are they responsible as such. 'The legislative power of this State shall be vested in the Senate and Assembly' ".

Clearly, the powers of a peace officer are such that they should be exercised only by publicly appointed officers for whom some responsible official may be held to account. Indeed under § 88 of the Railroad Law, appointment of Railroad Police is by a duly appointed police official. This is not true of the Pinkertons who "police" the World's Fair grounds.

In addition Article XIII § 1 of the Constitution of the State of New York requires public officers to take oaths, before entering office; Art. V § 6 provides that

Civil Servants must be appointed pursuant to competitive examinations. This includes police personnel. ROTHEIM v. PATTERSON , 172 Misc. 353, 15 N.Y.S. 2d 247 (1939); ANDERSON v. RICE, 277 N.Y. 271 (1938).

Thus, even if the Legislature could delegate the power to appoint peace officers to a private corporation, without violating "Due Process""equal protection,"or Art. 3 § 1, they were bound to do so in such a manner that neither Art. XIII § 1 nor Art. V § 6 would be violated. See also Public Officers Law:
§ 2 (term), §3 (qualifications), § 6 (mode of choosing), § 10 (oath taking and filing), §11 (official undertakings) § 15 (failure or neglect to file); § 38 (Termination), § 35 (removal), §§ 39-43 (filling of vacancies), §66-a (accident reports). The above provisions exist to insure that persons who hold positions as peace officers, etc., are both qualified and responsible.

If, therefore, the Pinkerton Guards are not Peace Officers, they had no more power to arrest than other private citizens, and hence they could only act pursuant to § 183 of the Code of Criminal Procedure. That section, which sets down the circumstances under which a private person may

make an arrest, does not authorize "citizens' arrests" for mere violations such as those under § 722. of the Penal Law. Furthermore, there can be no charge of obstruction of a "public officer" under § 183 of the Code if for any of the above reasons, the Pinkerton Guards are not duly appointed public officers.

In any event, the statute making peace officers out of police employed by the World's Fair Corporation (Laws of 1963, Chapter 892 § 1) was not complied with if the guards were employees of the Pinkerton Detective Agency rather than the Fair Corporation itself, and so, even if no violation of law is involved, the Pinkerton Guards are not peace officers.

As to the Charges of Violation of § 1851:

POINT VI

SECTION 1851 DOES NOT APPLY TO NON-VIOLENT, NON-COOPERATION WITH A PERSON'S OWN ARREST.

Between 1879 when § 1851 was passed and 1962 there were no reported cases under § 1851 arising from a situation in which a person was charged with resisting his own arrest by a peace officer. There are several reasons for this. First of all, persons charged with resisting arrest have always been prosecuted under § 1825 of the Penal Law, which specifies that the person resisting must have used "force or violence".

Second, there was considerable doubt that the term "public officer" used in § 1851 included police officers. PEOPLE v. STEWART, 47 N.Y.S. 348, 183 Misc. 212(1944).

In general, the statute was only applied in different types of situations. See PEOPLE v. RICHTER, 265 App Div 767, aff'd. 291 N.Y. 161; PEOPLE v. FIDLER, 280 App Div 698; and PEOPLE v. PAPP, 185 N.Y.S. 2d 907 (1959). Section 1825 was used in cases of forcible resistance to arrest. The very existence as well as the terms of that statute indicate the nature of the conduct which the legislature intended to proscribe. No authority exists which declares that "doing nothing" in an arrest situation is a crime under § 1851.

POINT VII

EVEN IF § 1851 IS APPLICABLE, NON-VIOLENT, NON-COOPERTTION IS NOT "RESISTANCE"

As stated above there is no basis for a finding that non-violent, non-cooperation constitutes "resistance" or "obstruction" under the terms of § 1851, Both terms require some sort of affirmative conduct in the nature of force. PEOPLE v. KNIGHT, 35 Misc. 2d 216 (1962); MOSES v. STATE , 6 Ga App. 251 (1109); HARRISON v. STATE 26 Ga App. 645 (1921); UNITED STATES v. LOSE, 63 F.951; STATE v. WELCH 37 Wisc. 196 (1875); D.C. v. LITTLE, 70S.Ct.468; REGINA v. DAGLY, 29 CR 55 (NS) (1958); REGINA v. SENENWICK; 14 WWK(NS) 523 (1955). Several unreported New York cases substantiate this view. In PEOPLE v. KELLY et. al, Mag. Ct., Brooklyn, March 30, 1962 charges under § 1851 were dismissed where defendants had merely "gone limp". Three similar cases arising from demonstrations at the Downstate Medical Center in Brooklyn were dismissed in 1963 for the same reason. Indeed, one is under no duty to assist in his own arrest particularly where there are doubts as to the validity of the charges. In WRIGHT v. GEORGIA, 83 S.Ct. 1240 at 1245

(1963), the Supreme Court said:

> "(O)ne cannot be prosecuted for failing to obey the command of an officer if that command itself is violative of the constitution."

Furthermore, a person must be given a fair notice and a reasonable time to comply before he may be charged with resisting arrest. In City of Columbia v. Bouie, 124 S.E. 2d 332 (S. Car.1964) The South Carolina Supreme Court in reversing a conviction for resisting arrest, said:

> "It is apparent from the testimony of the arresting officer that the only resistance on Bouie's part was his failure to obey immediately the officer's order, with the result that the latter had to pick him up out of his seat...but we do not think that such a momentary delay in responding to the officer's command as is shown by the testimony here amounted to 'resistance' within the intent of the law."

In general, it must be said that a reading of § 1851 reveals a degree of vagueness which raises serious "Due Process" problems. The application of this statute to cases of non-violent, non-cooperation accentuates the invalidity of the statute, by revealing that the statute contains no ascertainable standard of guilt. SCREWS v. UNITED STATES, 325 U. S. 91 (1945).

POINT VIII

IF THE OTHER CHARGES FAIL, THE § 1851 CHARGE MUST, AS A MATTER OF LAW, BE DISMISSED.

A charge of violation of § 1851 can not stand if there was no valid reason for making the arrest. One may resist an unlawful arrest. PEOPLE v. GALUK, 11 Misc. 2d 961 (1958). In PEOPLE v. GALAMISON, 42 Misc. 2d 391 (1963), the court said:

> "(I)f a defendant is charged both with disorderly conduct and resisting arrest, the latter charge must fall if he is acquitted on the former, because in such an event, defendant's original underlying arrest for disorderly conduct is deemed to have been unlawful, entitling him to use reasonable force to resist it." (At P. 393)

As to Charges of Violation of § 2036:

POINT IX

SECTION 2036 OF THE PENAL LAW APPLYING TO UNLAWFUL INTRUSION DOES NOT APPLY TO PERSONS WHO ENTERED LAWFULLY.

The history of Section 2036 is outlined in PEOPLE v. STEVENS, 109 N.Y. 159(1888). The present Section traces its history through Section 467 of the Penal Code of 1881 to its origin in Laws of 1857, C. 396 Sec. 1:

> "An act to punish nuisances and malicious trespasses on land.
>
> Any person who shall hereafter intrude or squat upon any lot or piece of land situated within the bounds of any incorporated city or village without license or authority from the owner thereof, who shall place therein any hut, hovel, shanty or other structure without such license or authority, or who shall place, erect or occupy within the bounds of any street or avenue of such city ..., any hut ...or other structure, shall be deemed guilty of a misdemeanor."

That provision, with the exception that the words "squat" and "trespass" which have been omitted, is in its terms almost the same as the present Section 2036. But Chapter 396 contained additional sections not carried over in the Penal Codes of either 1881 or 1938. Section 2 of Chapter 396 provided:

> "The owner of any lot or piece of land within the bounds of any incorporated city or village, may give notice to any intruder or squatter who

> may have heretofore intruded or squatted thereon, to quit the same on a day to be specified, which shall not be less than ten days thereafter, which notice may be left upon the premises addressed to the occupant...thereof, without specifying their names; and in case such intruder or squatter shall not quit the said premises at or before the expiration of the time specified in such notice, he...shall be deemed guilty of a mi demeanor."

When the two sections are read together, it is clear that Section 1 made criminal a wrongful entry to the property and that Section 2 sought the punishment of those remaining on the property of the owner against his wishes, regardless of the circumstances of the original entry.

Although Section 2 no longer appears on the Penal Code of 1881 or thereafter, the concept which it embodied was not lost to the law. In place of Chapter 396, Section 2, a civil remedy against those remaining on land over the objections of the owner was provided by Section 2232(4) of the Code of Civil Procedure of 1877. This new section provided a summary proceeding for the recovery of possession of real property.

That it was in fact the intention of the legislature to replace Section 2 of Chapter 396 with a civil remedy provided by Section 2232(4) was made clear in the New York Code of Civil Procedure, 1881, at page 354, where Commissioner Throop, one of the drafters of the Code, states:

> "Subdivision 4 is new. It was suggested by Laws of 1857 C. 396, Secs 1 and 2 (4 Edm 617), which made the acts herein provided for a misdemeanor. The owner will be much more effectually protected and restored to his rights by conferring upon him this civil remedy."

The descendants of Section 2232(4) are Section 1411(4) of the C.P.A. and Section 713 (3) of the C.P.L.R.

Only 2 cases even infer that a legitimate entry followed by a refusal to leave after permission has been withdrawn might fall within the terms of Section 2036. These cases (PEOPLE v. DESTEFANIS, 34 N.Y.S. 2nd 52 (1942), and PEOPLE v. SWALD, 73 N.Y.S. 2nd 399 (1947)) were both prosecutions under Section 722 of the Penal Law, in which Judge Walsh of the Utica City Court held only that the defendants in both cases were not guilty under Section 722. Although Judge Walsh offhandedly stated that the defendants "might well" have been prosecuted under Section 2036, it is clear that he had no occasion to consider the meaning of the statute.

The simple fact of entry or remaining on land against the will of the owner could certainly not constitute a criminal trespass at common law. Elements of "breach of the peace" have in fact been held to be material elements of the offense, STATE v. WHEELER, 3 Vt.344. In BARR v. CITY OF COLUMBIA, 84 S.Ct. 1734 (1964) the Supreme Court said:

> "It is one thing to say that a person remaining on another's land after being told to leave may be ejected with reasonable force or sued in a civil action, and quite another to say that he may be convicted and punished as a criminal. The clear distinction between civil and criminal trespass is well recognized in the common law...Unless a trespass is committed under such circumstances as to constitute an actual breach of the peace, it is not indictable at common law but is redressed by a civil action only...Pre-existing law gave petitioner no warning whatever that this criminal statute would be construed despite its clear language and consistent judicial interpretation to the contrary as incorporating a doctrine found only in civil trespass cases." Accord: BOUIE v. CITY OF COLUMBIA, 84 S.Ct.1697 (1964).

Also significant is the fact that several states have statutes which explicitly state that either "intruding" or "remaining" on property against the will of the owner shall be a crime. e.g. Louisiana: LOMBARD v. LOUISIANA 373 U.S. 267 (1963); Florida: ROBINSON v. FLORIDA, 378, U. S. 153 (1964.) By removing Section 2 of Chapter 396

of laws of 1857, the Legislature of the State of New York affirmatively indicated that Section 2036 was not intended to cover "intruding" or "remaining" alternately.

The staff comments concerning the new "real estate crimes" (Art. 1 Proposed New York Penal Law) fully recognize the gap in the present statutes:

> "When a person enters a building unlawfully but with no intent to commit a crime therein, or there is no evidence of such intent, the offense of burglary is not established. In cases where it is not probable that an intruder entered with the requisite intent, appropriate criminal sanctions should be available. The trespass provisions in the existing Penal Law Sections 1425(9), 2036) however, are at best ill-defined and narrow in scope PEOPLE v. STEVENS, 109 N.Y. 159, 16 N.E. 53 (1888). The proposed penal law corrects these deficiencies by presenting in three degrees a new definition of the offense of 'criminal trespass'..."

As has already been stated earlier, the World's Fair bears many of the indicia of public property.

The many public attributes of Fair property render it highly unlikely that § 2036 should be applicable at all. Certainly any member of the public may enter the Fair grounds. One who purchases a ticket before entering has not "intruded".

POINT X

PERSONS WHO ENTER AND REMAIN ON THE GROUNDS OF THE WORLD'S FAIR UNDER A COLORABLE CLAIM OF RIGHT LACK THE CRIMINAL INTENT NECESSARY UNDER SECTION 2036.

Since Section 2036 is a penal statute, a criminal intent must be shown for prosecution. PEOPLE v. STEVENS, supra; HEWITT v. NEWBURGER, 141 N.Y. 538, (1894) PEOPLE v. BARTON, 232 N.Y.S. 2d 75.

In PEOPLE v. BARTON, supra the defendant broke down a door to enter an apartment in which the complainant was the tenant. The apartment was used by a corporation in which both complainant and defendant were officers. Before the indicent, complainant informed defendant that he could no longer enter. On appeal, the court held that the defendant had a "colorable basis" for entering, this:

> "colorable claim of right - even if it were mistaken - negatives the criminal intent necessary."

Persons who purchase tickets and enter the World's Fair ground with the intention of exercising their constitutional right of free speech, lack the criminal intent necessary under § 2036.

Furthermore, peaceful conduct for the purpose of expressing a grievance was as stated previously " pro-

tected speech, " and no cause for either ejection or arrest.

EDWARDS v. SOUTH CAROLINA, supra; FIELDS v. SOUTH CAROLINA, supra; COX v. SOUTH CAROLINA, supra.,

Respectfully submitted,

ELI COHN
Attorney for Defendant

Of Counsel:

George Schiffer
Stephen M. Nagler
Jules Zalon
Carl Rachlin

Schafer

People of the State of New York
Vs:

1. B 2346 Jacqueline Butler
2. B 2347 Alice Jacobs
3. B 2348 Bonnie Brisker
4. B 2349 Gladys Moore
5. B 2350 Toni Robinson
6. B 2351 Jemera Ronel
7. B 2352 Dolores Quintyne
8. B 2353 Sheila Jampel
9. B 2354 Cynthia Post
10. B 2355 Sylvania Foa
11. B 2356 Geneva Young
12. B 2357 Georgette Kagan
13. B 2358 Ruth Rodriquez
14. B 2359 Booker Moore
15. B 2360 Jeffery Mitchell
16. B 2361 Robert Curvin
17. B 2362 Herbert Hardy
18. B 2363 Robert Miller
19. B 2364 Steven Permutter
20. B 2365 John Stelling
21. B 2366 Arthur Oesterreicher
22. B 2367 Mark Tishman
23. B 2368 Jonathan Harris
24. B 2369 Frederick Winter
25. B 2370 John Fisher
26. B 2371 Peter Dix
27. B 2372 Eliz Mitchell
28. B 2373 Kay Vanders
29. B 2374 Vivian Rebecca Hutchings
30. B 2375 Joyce Insolia
31. B 2376 Carlisle N. Yearwood
32. B 2377 Steve Durham
33. B 2378 Paul Nyden
34. B 2379 Sheldon Zinn
35. B 2380 Frank Espada
36. B 2381 Harvey Oliver
37. B 2382 Joseph Louis
38. B 2383 Julius Rabin
39. B 2384 Michael Flug
40. B 2385 Joseph [illegible]
41. B 2386 Maynard Maidman
42. B 2387 Paul Jasper
43. B 2388 Brent Groves
44. B 2389 Luis Perez
45. B 2390 Taylor James
46. B 2391 James Peak
47. B 2392 Louis Ford
48. B 2393 Ivory Perry
49. B 2394 Russell Martin
50. B 2395 Michael Klein
51. B 2396 James Statman
52. B 2397 Robert Jaffe
53. B 2398 Gerald Tenney
54. B 2399 Tom Bieber
55. B 2400 William Abrashkin
56. B 2401 Allen Solganick
57. B 2402 Jeffry Galper
58. B Michael Bartos
59. B 2404 William Forbs
60. B 2405 Daniel Chernofsky
61. B 2406 Jerry Cohen
62. B 2407 Harriet Puterman
63. B 2408 Pat Walker
64. B 2409 Arlene Boch
65. B 2410 Joan Foster
66. B 2411 Florence Miller
67. B 2412 Judith Jarmin
68. B 2413 Helen Geiger
69. B 2414 Elizabeth Adler
70. B 2415 Monique Bascoe
71. B 2416 Barbara Westerfield
72. B 2417 Jane Harris
73. B 2418 Joan O'Gorman
74. B 2419 Winifred Farrar
75. B 2420 Dena Weisman
76. B 2421 Marjorie Ziefort
77. B 2422 Lorette Hall
78. B 2423 Martin Jacobs
79. B 2424 Earl Scott
80. B 2425 Victor Miranda Jr.
81. B 2426 Steve Amour
82. B 2427 Jay Dravich
83. B 2428 George Manuel
84. B 2429 Paul Feingold

[illegible]t of the City of New York

Part 3, County of Queens

[illegible]E OF NEW YORK
COUNTY OF Queens } ss.:

Robert B. Cooke - Dir. of Public Relations, Schaefer's Brewery

of No. [illegible] 430 Kent Ave., County of [illegible] Kings

City of New York, being duly sworn, deposes and says that on April 22, 1964, at about M.,

at Schaefer's Exhibit - World's Fair, the County of Queens State of New York,

the defendant, 1)Jacqueline Butler; 2)Alice Jacobs; 3)Bernie Brisker; 4)Glady[illegible] Moore; 5)Tani Robinson; 6)Tamara Ronel; 7)Dolores Quintyne; 8)Sheila Jampel; 9)Cynthia Post; 10)Sylvania Fox; 11)Geneba Young; 12)Georgette Kag[illegible] 13)Ruth Rodriguez; 14)Becker Moore; 15)Jeffrey Mitchell; 16)Robert Curvin; 17)Herbert Hardy; 18)Robert Miller; 19)Steven Perlmutter; 20)John Stelling; 21)[illegible] 22)Mark Tishman; 23)Jonathan Harris; 24)Frederick Winter; 25)John Fisher; 26)Peter Dix; 27)Elizabeth Mitchell; 28)Kay Vander[illegible] 29)Vivian Hutchings; 30)Joyce Insolia; 31)Carlisle Yearwood; 32)Steve Durh[illegible] 33)Paul Nyden; 34)Sheldon Zinn; 35)Frank Espada; 36)Harvey Oliver; 37)Jose Louis; 38)Julius Rabin; 39)Michael Flug; 40)Joseph Pissarevsky; 41)Maynard Maidman; 42)Paul Jasper; 43)Brent Groves; 42)Perez, Luis; 43)Taylor Jones; 44)James Peak; 45)Louis Ford; 46)Ivory Perry; 47)Russel Martin; 48)Michael Klein; 49)[illegible] Stratman; 50)Robert Jaffe; 51)Gerald [illegible]enny; 52)Tam Bieber; 53)Wm. Abrushkin; 54)Allen Solganick; 55)Jeffry Galper; 56)Michael Barton; 57)Wm. Forbes; 58)Dan. Chernofsky; 59)Jerry Cohen; 60)Harriet Paterman;

violated Sec. 2036 of the Penal Law in that they unlawfully intruded upon private property without authority from the owner thereof; as appears from the following:

At the aforementioned time and place, the defendants surged into and milled about the bar and bar area maintained by the Schaefer Brewery as its World's Fair Exhibit, and leased by the said brewery for that purpose from the World's Fair Corporation. None of the defendants made a purchase. All milled about the area; some chanted and sang songs; several carried picket signs within this private enclosure; several chanted and shouted to all in the area, "Don't buy Schaefer beer"; several jumped up on the bar, danced upon it, damaged it, and cussed several patrons to leave. Deponent ordered the defendants to leave the private property upon which they thus intruded and they refused to do so.

61)Pat Walker; 62)Arlene Koch; 63)Joan Foster; 64)Florence Miller; 65)Judith Jas[illegible] 66)Helen Geiger; 67)Ellis Adler; 68)Monique Bascoe; 69)Barbara Westerfield; 70)J[illegible] Harris; 71)Joan O'Carman; 72)Winifred Farrar; 73)Dana Weisman; 74)Marjorie Ziefe[illegible] 75)Loretta Hall - adults now here - acting in concert with adolescent;
76)Diane Weinerman; 77)Frederica Canada; 78)Nelson Gilbert; 79)Robert Pam; 80) Dorothy Fielding; 81)Steve Wallarstein; 82)Bruce Glushakow; 83)Tristan Isrea; 84)Peggy Terrell; 85)Danny Pollack; 86)Carl Norton; 87)Joshua Rose; 88)Ann Shaft[illegible] 89)Laurie Weinstone - adults & adolescents being separately arraigned

WHEREFORE, deponent prays that the defendants be dealt with as the law provides.

Sworn to before me,
April 22, 1964, 19

Robert B. Cooke

J. Dolf Ehrlich
Judge, Criminal Court of the City of New York

Pending Leaves
(see R & P 14/2610) Vacation Other Leave:

Enumeration of defendants continued below

TO ALL TO WHOM THESE PRESENTS SHALL COME
OR MAY CONCERN,

GREETING: KNOW YE, That Donald B. Alper

hereinafter known as party of the first part, for and in consideration of the sum of One Dollar ($1.00) lawful money of the United States of America to myself in hand paid by The World's Fair 1964-1964 Corporation; Pinkerton's National Detective Agency, Inc.; the World's Fair Police Department; the City of New York; the Police Department of the City of New York; the Department of Parks of the City of New York; the Port of New York Authority; the State of Florida; the Florida Development Commission; the Florida World's Fair Authority, Inc; Mr. Edward A. Soucy, General Manager, Florida World's Fair Authority, Inc.; Mr. Ben H. Dickens, Attorney, Florida Development Commission and Legal Counsel, Florida World's Fair Authority, Inc.; and any and all of the officers, directors and employees of any of the foregoing; and the following members of the World's Fair Police Department:

hereinafter known as parties of the second part, the receipt whereof is hereby acknowledged, have remised, released, and forever discharged and by these presents do for my heirs, executors, and administrators and assigns, remise, release and forever discharge the said parties of the second part their heirs, executors, administrators, successors and assigns of and from all, and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, in admiralty, or in equity, which against said parties of the second part, I ever had, now have or which I or my heirs, executors, or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents.

This release may not be changed orally.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the 28th day of January in the year one thousand nine hundred and sixty-~~four~~ six.

Sealed and delivered in the presence of

Donald B. Alper

STATE OF NEW YORK)
: ss.:
COUNTY OF QUEENS)

On the 28 day of January 1964 before me came DONALD B. ALPER to me known and known to me to be the individual described in and who executed the foregoing instrument and acknowledged to me that executed the same.

John J. Kearns

JOHN J. KEARNS
NOTARY PUBLIC, State of New York
No. 41-7193200 - Queens County
Term Expires March 30, 1966

Unlawfully trespassing on a quasi public property, Disorderly Conduct

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS : PART IB

The People of the State of New York

-against-

JOACHIM PRINZ, LILLIAN B. STEINBERG, and HARRY E. SCHACTER,

Defendants

Docket Nos.
B 3246
B 3247
B 3248

The People of the State of New York

-against-

THEODORE BIKEL, THEODORE KOLISH and ROBERT WECHSLER,

Defendants

Docket Nos.
B 3249
B 3250
B 3251

The People of the State of New York

-against-

BEVERLY SPIEGEL and JAMES H. SCHEUER,

Defendants

Docket Nos.
B 3252
B 3253

The People of the State of New York

-against-

HILDE PRINZ, THEODORE MANN and JACQUELINE LEVINE,

Defendants

Docket Nos.
B 3254
B 3255
B 3256

----------x

The People of the State of New York

-against-

IRVING C. DWORK,

Defendant

----------x

Docket No.
B 3244'

BEFORE :

HON. BERNARD DUBIN, Judge.

APPEARANCES:

For the People:
HARVEY B. EHRLICH, ESQ.,
Assistant District Attorney

For the Defendants:
HOWARD M. SQUADRON
32 East, 57 Street
New York 22, N.Y.
WILL MASLOW
JOSEPH B.ROBISON
LOIS WALDMAN
of Counsel

AMICUS CURIAE
WHITMAN, RANSOM & COULSON
Attorneys for
New York World's Fair 1964-1965 Corporation
CHARLES F. PREUSSE
JOHN V. THORNTON
BERNARD L. SANOFF
PINCUS M. BERKSON
of Counsel

THE COURT:

Eleven of the twelve defendants herein are charged with a violation of Section 722 of the Penal Law, in that they picketed in front of a pavilion in the World's Fair and thereby did annoy, disturb, and interfere with persons in the vicinity, did obstruct thoroughfare to the annoyance of persons walking; obstructed vehicular traffic and caused a crowd to collect and refused to desist after being admonished to do so. The twelfth defendant was charged with the violation

of Section 722, in that at the same site he was loud and boisterous; displayed signs; and caused a crowd to collect.

The twelve defendants together approached the entrance to the New York World's Fair for the purpose of paying admission and entering the Fair grounds so that they might picket the Jordan Pavillion in order to protest the existence of a mural in said Pavillion, which they contend was factually incorrect and tended to create bigotry and hostility to a foreign nation and to a race of people.

The defendants were warned that picketing or displaying placards within the Fair grounds would violate a rule and regulation of the World's Fair Corporation, which operated the New York World's Fair, without prior permission to do so from the Fair Corporation. There was some testimony that a request for permission to picket had been made and refused.

Prior to entering the Fair grounds the defendants surrendered placards in their possession and were escorted by the members and officers of the World's Fair Police to the site of the Jordan Pavillion. One of the defendants did have a placard which he exhibited at the site of the Pavillion.

Upon their arrival there, the defendants formed into a single file and walked, once, in that formation, past the Pavillion. There was no evidence of any speeches, or chanting, or singing or loud noises or direct interference with any persons. As indicated, one person displayed a placard.

The testimony indicated that there were present at the site a large number of persons. This group included 30 World's Fair Policemen, newspaper men, television men, camera men, and other persons involved in news media. There was no testimony as to what portion of that group, if any, were not connected either with the picketers or news media. Tes-

timony with respect to obstruction of vehicles was contradictory.

It was argued that the World's Fair Site is private property and that the rights guaranteed by the 1st and 14th amendments of the U.S. Constitution did not apply as they would if this were public property. There is no question but that picketing is a legal application of the right of free speech under certain conditions and circumstances pursuant to the first amendment of the Constitution, which is extended to the states by the 14th amendment. (Cantwell v. Conn.310, U.S. 96, Thornhill v. Ala. 310, U.S. 88).

There is no question that, under certain conditions and circumstances picketing would not be lawful and that all picketing is subject to reasonable regulations.

What is reasonable is a question of fact. When picketing or demonstrations are not peaceable, when they constitute a violation of law, depends upon the place, the time, the subject matter, the manner in which the picketing or demonstration is conducted and the temper of the persons then present. Whether such acts impede or obstruct traffic, prevent people from traversing the thoroughfare, whether continuance of the acts would trigger violence and result in property damage or physical injury are subject to the facts then present. In 1959 the New York World's Fair was organized as a membership corporation "to organize, construct, hold and operate the World's Fair in the City of New York for the exclusively educational purposes of educating the peoples of the world as to interdependence of nations and the need for universal peace". In 1960 legislation was enacted with respect to the operation of the Fair by the Fair Corporation and also with the establishment of a State Fair Commission. In 1962

additional legislation empowered the State Commission to do such acts as would guarantee the greatest number of visitors to the State Exhibit within the Fair ground and to the State of New York itself.

The grounds on which the Fair is located, consisting of 640 acres, is owned by the City of New York and was leased to the Fair Corporation at no specified rental. Upon termination of the Fair, the Fair Corporation is to turn over to the city all of its remaining net revenues and such buildings as approved by the City Park Commissioner. Although there was no showing that the City or State contributed monies to the Fair Corporation, it is clear that both the City and State expended millions of dollars with respect to their exhibits and with respect to the permanent improvements in and outside the Fair grounds. The Fair Corporation is exempt from the payment of any taxes. Its police force was designated by the State to be peace officers. The legislature enacted into law the provision that "as to a violation of any provision of law relating to safety, regulation of traffic or the preservation of order" occurring on any of the roads within the Fair, such roads shall be "deemed public streets roads or highways", although the private status of such streets was not to be effected thereby.

As proof of its private nature, it is argued that the Fair Corporation is entitled to charge an admission fee for those who wish to enter and the Fair grounds are enclosed by a fence.

In a matter pending in the United States District Court, entitled Farmer v. Moses, Judge Tyler, making reference to the holding in Marsh v. Alabama, 326 U.S. 501, at page 506, said "Upon analysis of the foregoing facts

(referring to the New York City World's Fair) I find that the Fair Corporation and its operations are so impregnated with and supported by State and City action as to place them within the ambit of the 14th amendment. This is so even though it may be reasonably inferred that the Fair Corporation does possess certain indicia and aspects of "private" ownership and dominion.""(See also Hearns Department Store v. Livingston, 125 NYS, 2d, 806.)

In my opinion, the World's Fair is quasi public and should not be exempt from the application of the 14th amendment and the guarantee of the rights of free speech.

The contention advanced by amicus curiae that, among other conditions, the right to charge admission and the enclosure of the grounds by a fence, show private status, is not convincing.

There are very few things in life that are free, whether public or private. The parking of a car on many of our public roads, require the payment of a meter charge. Driving along many of our public roads, such as thruways, require the payment of toll fees. We pay for the very water we drink, by a water tax. Similar examples are readily found contrary to the adage, the best things in life are not free. Similarly, fencing of a public area is not unusual. Visits to many public parks and playgrounds will show a fence surrounding them.

The complaints here alleged a breach of the peace a violation of order. We are then constrained to pay particular attention to Chapter 892, paragraph 3, of the laws of the State of 1963 as amended by Chapter 580 of the laws of New York of 1964, the essential portions of which are "A violation of any provision of law relating to safety, regulation of

traffic or the preservation of order occurring at or on the streets.... of the property under the jurisdiction of New York World's Fair 1964-1965 Corporation shall be deemed to have occurred on a public street...".

The 1964 Amendment which declares that the "private property status" shall not be effected thereby, has no bearing here inasmuch as there was no charge made of trespass or intrusion upon the realty.

If, then, for the purpose of the consideration of any violation of order, the street is deemed to be public, then we are constrained to determine whether there has been a violation of any of the element of Section 722 of the Penal Law.

Each of the defendants testified. An evaluation of their background and participation in community service makes it evident that none of them had an intent to provoke the breach of the peace. The presence of thirty (30) World's Fair policemen, and perhaps more, negatives the idea that a breach of the peace might have been occasioned. I find that there was no use of offensive, disorderly, threatening, abusive or insulting language, conduct or behavior on the part of any of the defendants. There was no proof that their actions annoyed, disturbed or interfered with or obstructed or was offensive to passersby. The testimony indicated that a crowd included newspaper men, television men, camera men and others involved in news media as well as the World's Fair police, There was no showing that the crowd included persons other than persons such as described. Furthermore, in the event that other persons were attracted, it is reasonable to believe that the presence of a large number of police, television, radio and probably motion picture equipment and police vehicles would

arouse the curiosity of passersby and cause them to collect. It is natural for people to stop, look and listen at that which is unusual.

Another contention has been made that the defendants congregated in front of the Jordan Pavilion and refused to move on by order of the Police. Apparently, the only instructions were not to picket, and, in fact, the defendants were actually moving in single file with an approximate six foot distance between them and were about to make a turn and continue to walk when they were arrested.

I have concluded that the World's Fair is a quasi-public operation and that all guarantees of the United States Constitution applies. The World's Fair streets and avenues are subject to any and all laws that may apply to any other public thoroughfare.

This decision in no way shall be construed to mean that all picketing shall be permitted in the Fair Grounds. Although the Fair grounds is quasi-public, consideration must be given to the type of picketing, the number of pickets, will the picketing cause disorder, obstruction of traffic, a breach of the peace, will it annoy and harass the public. The First Amendment of the Constitution gives no one the right to cause disturbances, breach of the peace or riots under the guise of free speech.

The facts presented in this case indicate that the picketing was peaceful and lacked any and all elements necessary to convict for violation of Section 722 of the Penal Law.

It is my opinion that the World's Fair authorities might have made some effort whether legally bound to do so or not, to have the offensive mural removed. They objected

to one defendant exhibiting an innocuous placard, yet a mural is allowed to remain which many people feel creates hatred and bigotry against a foreign nation and a race of people. The reasoning seems to be inconsistent.

The defendants are found not guilty and are discharged,

Bernard Dubin
J.C.C.

July 29, 1964